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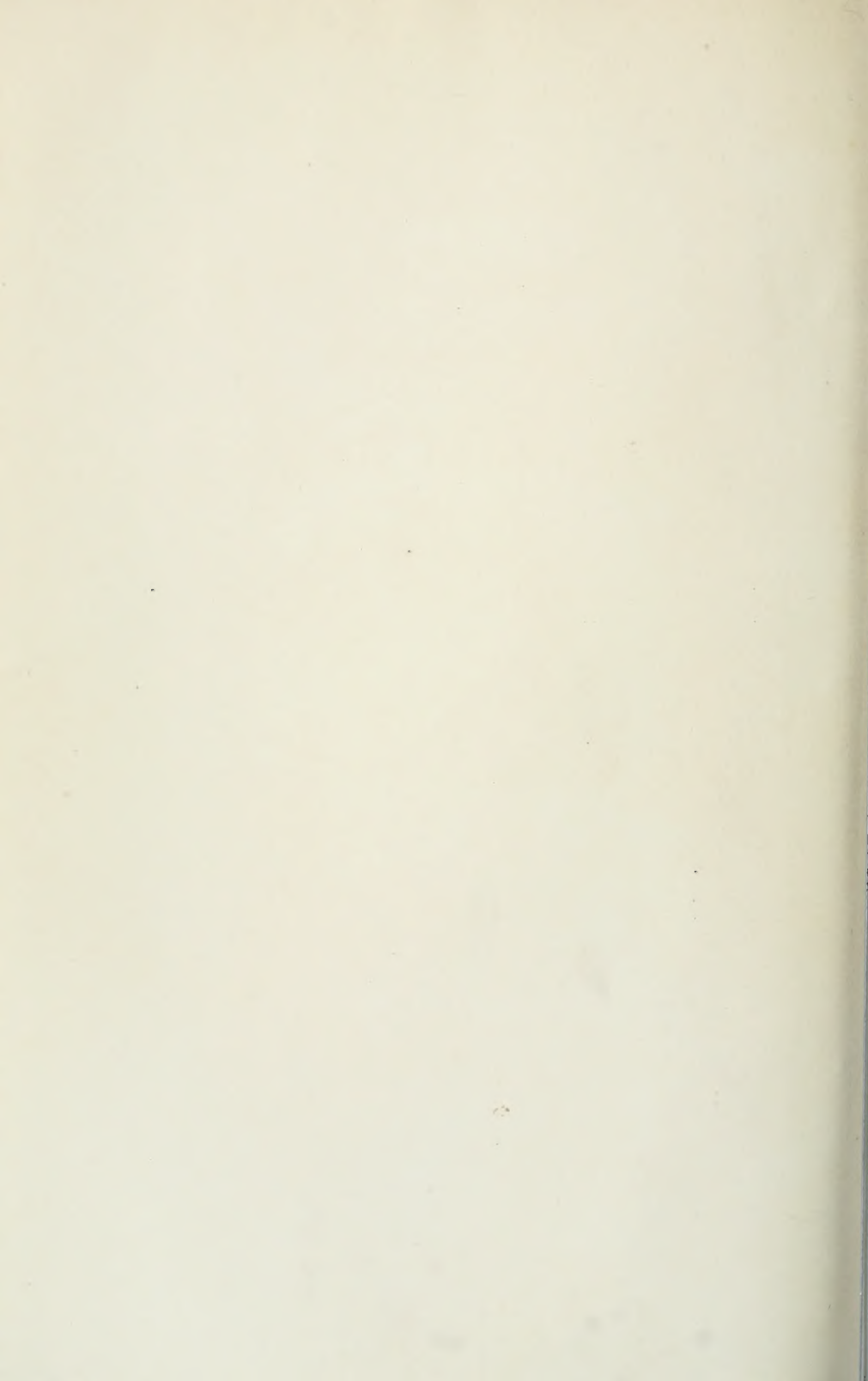
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761
No. 2155

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN FIVE VOLUMES)

EBNER GOLD MINING COMPANY (a Corporation),
Plaintiff in Error,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant in Error.

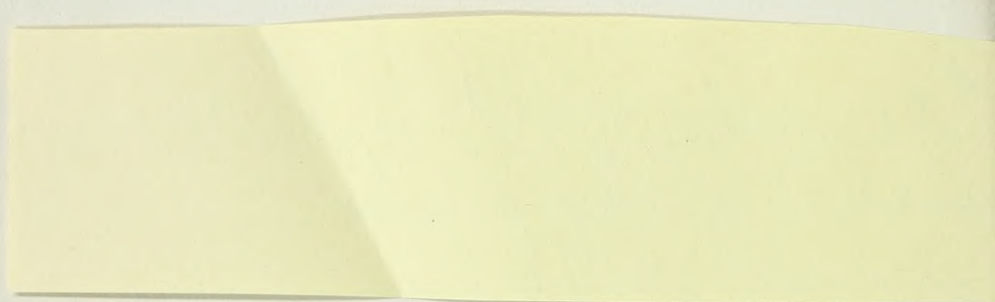
VOLUME I.
(Pages 1 to 368, Inclusive.)

Upon Writ of Error to the United States District Court of
the District of Alaska, Division No. 1.

FILED

DEC 27 1912

Records of U. S. Circuit
Court of Appeals
761



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff and Plaintiff in Error,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant and Defendant in Error.

Messrs. WINN & BURTON, Attorneys for Plaintiff
and Plaintiff in Error, Juneau, Alaska.

Messrs. HELLENTHAL & HELLENTHAL, and
Messrs. SHACKLEFORD & BAYLESS, Attorneys for Defendant and Defendant in Error,
Juneau, Alaska.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2155.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant in Error.

**Statement of Errors on Which Plaintiff in Error
Intends to Rely and the Parts of the Record
Which Plaintiff in Error Thinks Necessary for
Consideration.**

Now comes the plaintiff in error above named, and hereby makes the following Statement of Errors on which it intends to rely and urge upon its writ of error in the above-entitled court in said cause, and of the parts of the record which it thinks necessary for the consideration thereof, said errors being those set forth in said plaintiff in error's assignment of errors contained in the Transcript of Record on file herein and hereby referred to, to wit:

STATEMENT OF ERRORS.

The Court erred in overruling and denying plaintiff's motion to strike from defendant's answer all those portions of the same and each and every part thereof moved against in the motion of plaintiff filed herein on May 15, 1911.

II.

The Court erred in overruling plaintiff's demurrer to the defendant's further answer to the second cause of action stated in the amended complaint, and also plaintiff's demurrer to defendant's answer to the third cause of action stated in the amended complaint; which said demurrer is filed herein on May 16, 1911.

III.

The Court erred in allowing the defendant herein, after the trial of said cause, to amend its answer herein by pleading a noncompliance of plaintiff in

performing the annual assessment work upon the Parrish No. 2 Lode Mining Claim, and pleading a forfeiture thereof; which said amendment was filed on June 9th, 1911.

IV.

The Court erred in permitting the defendant upon the trial of said cause over the objections of the plaintiff, to introduce evidence with reference to the appropriation and acquisition of water and water rights and the conveying of such water by flume, pipe, or ditch line across mining claims and real estate of others and conveying such water to the place of use or intended use of such appropriator. The introduction of such evidence and testimony to establish any such custom among miners of South-eastern Alaska and in the Harris Mining District was all admitted over the objections and exceptions of the plaintiff.

V.

The Court erred in not making, signing and filing the following Findings of Fact and Conclusions of Law offered and tendered by the plaintiff herein respecting Parrish No. 2 Lode Mining Claim, to wit:

Finding No. 4 offered and tendered by plaintiff herein, which said finding is substantially as follows:

“That the plaintiff is now and has been for several years last past, seised, possessed and entitled to the possession and the owner by discovery, location staking and marking of the boundaries and recording by its grantors and predecessors in interest and by a full compliance with the laws of the United States and doing and per-

forming of the annual assessment work each and every year of the Parrish No. 2 Lode Mining Claim, etc.”

And in not making and signing and filing Finding No. 5 offered and tendered by plaintiff, which requested the Court to find:

“That while plaintiff was so seised and possessed and entitled to the possession of the Parrish No. 2 Lode Mining Claim, the defendant, some time in the month of August, 1910, and before the commencement of this action, without right or title, entered into possession of part of Parrish No. 2 Lode Mining Claim and ousted and ejected plaintiff therefrom and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.”

And in not making, signing and filing Finding No. 6 offered and tendered by the plaintiff herein, which is substantially as follows:

“The Court further finds that at the time of the commencement of this action and for several years prior thereto the plaintiff was the owner and entitled to the possession of said Parrish No. 2 Lode Mining Claim as against the defendant and all persons and corporations whomsoever, and all of the service ground thereof.”

The Court also erred in not making the Findings of Fact tendered and requested by plaintiff which are as follows:

(a) “The Court further finds that the annual assessment work and labor required by law has

been done and performed upon the Parrish No. 2 Lode Mining Claim for the years 1907, 1908, 1909 and 1910 and within the time in each of said years required by law.”

(b) “The Court further finds that the annual assessment work required by law has been done and performed upon the Parrish No. 2 Lode Mining Claim for the years 1908, 1909 and 1910.”

(c) “The Court further finds that the annual assessment work and labor has been done and performed upon the Parrish No. 2 Lode Mining Claim each and every year since its location in the year of 1899.”

VI.

The Court erred in not making, signing and filing Conclusions of Law Nos. 1 and 2 offered and tendered by plaintiff which in substance requested the Court to conclude that the plaintiff was entitled to a writ of ejectment ejecting said defendant from Parrish No. 2 Lode Mining Claim, and granting a restraining order against the defendant restraining it from anywise interfering with plaintiff's possession of Parrish No. 2 Lode Mining Claim.

VII.

The Court erred in making and rendering its Findings No. 5, which is as follows:

“That the plaintiff is not and never has been seised, possessed or entitled to the possession of that certain tract of ground described in paragraph III of the plaintiff's second cause of action, set forth in the amended complaint herein

and known and referred to as Parrish No. 2 Lode Mining Claim. That the ground claimed by the plaintiff as Parrish No. 2 Lode Mining Claim was located solely for purposes of convenience; that no discovery of mineral-bearing rock in place of any value was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in its development or in the expectation of finding ore."

Also in making Finding No. 6, wherein the Court finds in substance that plaintiff did not, prior to the year 1909, perform the necessary assessment work on Parrish No. 2 Lode Mining Claim.

The Court also erred in making all that part of Finding No. 7 in which it finds that the defendant proceeded to erect a part of a dam on the public domain, and that at said time the property described in Parrish No. 2 Lode Mining Claim was a part of the unoccupied and unsegregated public domain of the United States. All of which said Findings were against law and without any evidence to support the same, and in many respects against all of the evidence in said cause and against the admitted facts by both plaintiff and defendant in the pleadings and upon the trial and hearing of said cause.

VIII.

The Court further erred in making the following findings: Finding No. 8, in which the Court finds in substance that under the custom of miners of Harris Mining District, being the District in which Parrish No. 2 Lode Mining Claim is located, that appropria-

tors of water had uniformly the right to build ditches, etc., across unpatented mining claims owned and held by other persons, etc., and also Finding No. 9, in which the Court finds substantially that under the customs of miners the riparian proprietor has no right to the use of water of running streams by reason of such riparian ownership, as against a prior appropriator, and that the defendant went upon Parrish No. 2 Lode Mining Claim to construct a dam, etc., for the purpose of diverting and appropriating the water to be used in running of a stamp-mill, etc.; for the reason that each and all of said findings are against law, unsupported by the evidence, and against the great preponderance of evidence and against the uncontradicted facts in the case.

IX.

The Court erred in making his Conclusion No. 3, which reads as follows:

“That the location known as Parrish No. 2 Lode Mining Claim is void and of no effect.”

Said conclusion is without any evidence to support the same. The Court further erred in making Conclusion No. 5, which reads as follows:

“The Court further concludes that neither of the parties is entitled to recover costs in this suit.”

—for the reason that said conclusion is unsupported by the evidence and against law—the Court having granted affirmative relief to the plaintiff and adjudged it to be the owner of the Lotta Lode Mining Claim set forth and described in the first cause of action in the amended complaint, and by reason of

this the plaintiff was entitled to recover its costs in said action.

X.

The Court erred in that part of the judgment and decree in said cause wherein it adjudged and decreed as follows:

“It is further considered, ordered, adjudged and decreed that the plaintiff take nothing further by his complaint herein, and except as to the Lotta Lode Mining Claim this cause and action be dismissed without costs to either side.”

XI.

The Court erred in overruling the motion of plaintiff for new trial herein.

XII.

The Court erred in not signing, settling and allowing the Bill of Exceptions presented for said purpose on the 23d day of May, 1912.

Parts of the record which plaintiff in error thinks necessary for the consideration of said errors by the Court of Appeals is as follows:

FIRST: All of the original certified record (excluding the exhibits other than those hereinafter requested), except that part of said record entitled “Balance of Evidence to Complete Bill of Exceptions and Transcript,” immediately following the certificate of the Court Reporter, which certificate is dated May 15, 1912, and certifies that the testimony and evidence preceding such certificate is all the testimony, etc., pertaining to the Parrish No. 2 Lode Mining Claim; such certificate being numbered in lower right-hand corner 1222 by rubber stamp.

The part of the evidence excluded is pages numbered 1 to 299, both inclusive, in typewriting bottom center paging, following the testimony, evidence and certificate aforesaid, and being numbered 1223 to 1522 in lower right-hand corner by rubber stamp.

SECOND: Exhibits which the plaintiff in error requests to be printed are as follows, viz.:

PLAINTIFF'S EXHIBITS.

Exhibit "N," on page —— (Map Ebner Mining Claims).

Exhibit "M," on page —— (Photo showing tunnels).

Exhibit "QQ," on page —— (Photo).

Exhibit "PP," on page —— (Photo).

Location Notice Parrish No. 2 Lode, page ——.

Deed from Wm. M. Ebner to Ebner Gold Mining Company conveying Parrish No. 2 Lode, page ——.

Contract, Deed and Resolution in re conflict Parrish No. 1 with Colorado Lode, pages —— to ——.

Answer and Oral Opinion in Cause No. 803-A, page ——.

Copy of page 99 of Ledger of Ebner Gold Mining Company, page ——.

DEFENDANT'S EXHIBITS.

Exhibit No. 3 (Plat), on page ——.

Exhibit No. 9, on page —— (Photo showing rock).

Exhibit No. 21, on page —— (Photo).

Exhibit No. 68, on page —— (Photo).

Exhibit No. 69, on page —— (Photo).

Exhibit No. 66, on page ——— (Plat of Geological Sketch map of Gold Creek).

Exhibit No. 70, on page ——— (Photo open cut).

Exhibit No. 11 on page ——— (Plat showing mining properties in and about Juneau).

Certain canvas sack containing exhibits of rocks.

WINN & BURTON,

Attorneys for Plaintiff in Error.

Service of the within and foregoing statement of Errors on which plaintiff in error intends to rely, and parts of record which plaintiff in error thinks necessary for consideration, upon its Writ of Error in said foregoing entitled cause, is admitted this 15th day of July, A. D. 1912.

J. A. HELLENTHAL,

Attorney for Defendant in Error.

[Endorsed]: 2155. In the United States Circuit Court for Ninth Circuit. No. 2155. Ebner Gold Mining Co., a Corporation, vs. Alaska-Juneau Gold Mining Co., a Corporation. Statement of Errors on which Plaintiff in Error Intends to Rely, and Parts of Record Which Plaintiff in Error Thinks Necessary for Consideration. Filed Jul. 22, 1912. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit, Holden at San Francisco.*

THE EBNER GOLD MINING COMPANY, a
Corporation,

Plaintiff in Error,

vs.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Defendant in Error.

**Request of the Defendant in Error That the Entire
Record be Printed.**

Comes now, the Alaska-Juneau Gold Mining Company, defendant in error herein, and represents as follows:

That it was served with a notice by the plaintiff in error, that a statement of the errors on which the plaintiff in error intends to rely and also a statement of those parts of the record which plaintiff in error thinks necessary for the consideration of the matters intended to be reviewed.

The defendant in error believes that the evidence relating to the various matters is so interwoven that the matters referred to in said statement and the errors therein assigned cannot be reviewed unless the entire record consisting of the entire bill of exceptions, as well as all of the exhibits, is printed and submitted to the Court; and the defendant in error thinks that the entire record is material, including all of the testimony, as well as the exhibits offered at the trial, including that portion of the bill of excep-

tions sought to be excluded by the plaintiff in error, the same being pages No. 1 to 299, both inclusive, in typewriting bottom center paging being No. 1223 to 1522 in lower right-hand corner by rubber stamp, and all the exhibits contained in the bill of exceptions or sent down as part of the record not enumerated in the list of exhibits which plaintiff in error seeks to have printed. The defendant in error therefore asks that the entire record be printed by the Clerk.

J. A. HELLENTHAL,

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant in Error.

[Endorsed]: 2155. In the United States Circuit Court of Appeals for the Ninth Circuit. The Ebner Gold Mining Company, a Corporation, Plaintiff in Error, vs. Alaska-Juneau Gold Mining Company, a Corporation, Defendant in Error. Request of the Defendant in Error That the Entire Record be Printed. Filed Jul. 22, 1912. F. D. Monckton, Clerk.

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Amended Complaint.

Plaintiff complains of the defendant and alleges:

I.

That the plaintiff is a corporation (organized December 5, 1895), and existing under and by virtue of the laws of the United States provided for the District of Alaska, and is authorized to do and has been engaged and doing a general mining business in said District for over fifteen years.

2.

That the defendant is a corporation duly organized and doing business in the District of Alaska.

3.

That the plaintiff is now and has been for several years last past seized in fee and possessed and entitled to the possession of that certain patented lode mining claim situated in Harris Mining District, District of Alaska, viz.: The Lotta lode mining claim, U. S. Mineral Survey No. 87, more particularly described as follows, to wit: Beginning at Corner No. 1 Lotta lode claim (patented), a post at the NW. centre end of claim; [1*] thence north $57^{\circ} 24'$ east 150 feet to Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. 3, identical with Corner No. 5 Taku Gold & Silver lode claim, Survey No. 88, patented, and Corner No. 1 Royal lode, Survey No. 238, patented; thence south $57^{\circ} 24'$ west 150 feet to south-east centre end of Lotta lode, 300 feet to Corner No. 5, identical with Corner No. 5 Royal lode, Survey No. 238, patented; whence east side doorway of old

*Page-number appearing at foot of page of original certified Record.

cabin bears north $5^{\circ} 7'$ east 96.2 feet distance; thence north $31^{\circ} 36'$ west 1500 feet to Corner No. 6; thence north $57^{\circ} 24'$ east 150 feet to NW. centre end and place of beginning. Mag. Var. of all courses from a true meridian 32° east of north.

4.

That while plaintiff was so seized, the defendant between the — day of August, A. D. 1910, and the commencement of this action, and without right or title, entered into possession of part of said Lotta lode mining claim, and constructed thereon a dam and flume for the purpose of conveying from, on and over part of said patented Lotta lode mining claim the waters of Gold Creek flowing in, through and over said Lotta lode mining claim; and ousted and ejected therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

FOR A SECOND CAUSE OF ACTION:

1.

That the plaintiff is a corporation authorized to do and doing business in the District of Alaska, and organized, etc., as mentioned in paragraph 1 of the first cause of action.

2.

That the defendant is a corporation doing business in the [2] District of Alaska.

3.

That the plaintiff is now, and has been for several years last past, seized, possessed and entitled to the possession, and the owner by discovery, location, staking and marking of the boundaries and record-

ing by its grantors, and by a full compliance with the laws of the United States, and the doing and performing of the annual assessment work, of the Parish No. 2 lode mining claim, situate in the Harris Mining District, District of Alaska, and fully described in the Location Notice thereof of record in Book 15 of Lodes, page 157, of the Records of the Juneau Recording District, in the office of the Recorder of said Juneau Recording District, in the District of Alaska, as follows, viz.:

Commencing at the notice of location posted on a post in Gold Creek canyon about 600 feet in a westerly direction from the southwest corner of the Lotta patented claim and running in a southeasterly direction parallel to the said Lotta and the Royal lode claims, patented, and about 300 feet from the same to the end of lode claim, Parish No. 1, being 700 linear feet, and from the location post in a northwesterly direction parallel with the southwest line of the said Lotta lode claim 800 linear feet, together with 300 feet in width of surface ground on each side of the center of the lode line. Side lines are described as follows, viz.: Commencing at the southeast corner marked by a post situated about 125 feet in a southeasterly direction from the southwest corner of the Lotta lode claim and on the southwest side line of the Royal lode claim, thence in a southwesterly direction 600 feet to a post; thence in a northwesterly direction parallel with the southwest side line of said Lotta lode claim 1500 feet to a post, thence in a northeasterly

direction 600 feet to the southwest side line of the said Lotta lode claim; thence southeasterly along the southwest side line of the said Lotta lode claim to the southwest corner of said lode claim and 125 feet beyond in the same direction to a post, the point of beginning.

4.

That while plaintiff was so seized and possessed and entitled to the possession of the above-described Parish No. 2 lode mining claim the defendant, between the — day of August, A. D. 1910, and the commencement of this action, and without right [3] or title, entered into possession of part of said Parish No. 2 lode mining claim hereinabove described, and constructed and built upon, across and over said Parish No. 2 lode mining claim a grade and placed thereon a flume, for the purpose of conveying the waters of Gold Creek over, upon and across the said Parish No. 2 lode mining claim; and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

FOR A THIRD CAUSE OF ACTION:

1.

That the plaintiff is a corporation authorized to do and doing business in the District of Alaska, and organized and existing as stated in paragraph 1 of the first cause of action.

2.

That the defendant is a corporation doing business in the District of Alaska.

3.

That the plaintiff is now, and has been for several years last past, seized, possessed, and entitled to the possession, and the owner by discovery, location, staking and marking of the boundaries, and the doing and performing of the annual assessment work and extensive development by tunnel, etc., and by actual occupation, and by a full compliance with the laws of the United States, of the Cape Horn lode mining claim, situated in the Harris Mining District, District of Alaska, and described as follows, viz.:

Commencing at the NE. corner of Cape Horn No. 1 lode, whence the SW. corner of Parish No. 2 lode, Survey No. 934, bears S. $48^{\circ} 30'$ east 329 feet distance; thence along Gold Creek bottom south 45° west 600 feet to the SE. Corner of claim; thence N. 45° west 1500 feet to the SW. corner of claim; thence north 45° [4] east 600 feet to NW. corner of claim; thence south 45° east 1500 feet to the NE. corner of claim, and place of beginning, containing an area of 20.661 acres. The southeast corner of this claim is further described as being in Gold Creek bottom and about 125 feet in a north-easterly direction above the Jualpa dam.

4.

That while plaintiff was so seized, possessed and in the actual occupation, and entitled to the possession, of said Cape Horn lode mining claim, the defendant between the — day of July, A. D. 1910, and the commencement of this action, and without right or title, entered into possession of part of said

Cape Horn lode mining claim above described, and erected and built thereon a house or cabin, and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

WHEREFORE plaintiff prays judgment against the defendant:

1. For the recovery of the possession of the premises from which plaintiff has been ousted and ejected by the defendant as in this complaint fully set forth and described.

2. That the defendant be restrained and forever enjoined from interfering with the possession of the plaintiff in and to the mining claims herein described or any part thereof.

3. For costs and disbursements of this action.

4. For such other and further relief as plaintiff may be entitled to receive.

WINN & BURTON,
Attorneys for Plaintiff. [5]

United States of America,
District of Alaska,—ss.

Jno. R. Winn, being first duly sworn, on oath deposes and says: That I am one of the attorneys for the plaintiff herein and have read over and drafted the Amended Complaint herein, and all the material allegations of said Amended Complaint are within the personal knowledge of affiant; and that the matters, things and facts set forth in said Amended Complaint are true as affiant verily believes.

JNO. R. WINN.

Subscribed and sworn to before me this 8th day of May, A. D. 1911.

[Seal]

NEWARK L. BURTON,
Notary Public for Alaska.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Amended Complaint. Filed May 8, 1911. E. W. Pettit, Clerk. By ———, Deputy. John R. Winn, Newark L. Burton, Attorneys for ———. Office, Juneau, Alaska, Office No. ——. [6]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

Case No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Answer.

Comes now the defendant and for answer to the first cause of action stated in the amended complaint, admits, denies and alleges as follows:

1st. The defendant denies each and every allegation in said amended complaint contained with reference to said first cause of action, except that the de-

fendant is a corporation doing business in Alaska.

2d. The defendant alleges that the plaintiff is not a corporation either *de jure* or *de facto*, and has no capacity either to sue or hold property.

3d. That the defendant is the owner of and entitled to the possession of all that certain tract of mining ground situated up Gold Creek, about one mile from the town of Juneau in the District of Alaska, more particularly described as follows, to wit:

“Commencing at discovery post, thence south 14 degrees west 100 feet to post No. 1, center of south end line lying on north side line of Colorado lode, U. S. S. 612; thence north 84 degrees east 300 feet to post No. 2; thence north 14 degrees east 1500 feet to post #3; thence south 84 degrees west 600 feet to post #4; thence south 14 degrees west 1500 feet to post #5, identical with corner #5 [7] Colorado lode; thence north 84 degrees east 300 feet to post #1.”

—which said mining ground is held and claimed by this defendant under and by virtue of a certain lode mining location made by J. P. Corbus in the month of October, 1899, and known as the Oregon mining claim, and also by virtue of a certain mining lode location made on July the 20th, 1910, by R. G. Datson, which said location is designated and known as the Oregon lode mining claim; that both of which said mining claims and locations were by mesne conveyances conveyed to this defendant and this defendant is now the owner thereof.

4th. That the defendant is the owner, in the possession of and entitled to the possession to a cer-

tain patented lode mining claim U. S. Survey #641, contiguous to the Oregon lode mining claims above described and more particularly bounded and described as follows:

“Beginning at Cor. No. 1 Colorado lode, identical with Cor. No. 4 Royal lode Sur. No. 238, SE. Loc. Cor. Colorado bears S. 33.45 E. 77.64 feet, U. S. Loc. Mon. No. 2, situate in Silver Bow Basin, bears 86.47 E. 5817 feet distance; Thence S. 56.15 W. along 2-3 Nevada lode Sur. #612, 86.30 feet to Cor. No. 2, identical with Cor. No. 2 Survey #612; thence S. 41.15 E. along line 2-1 Nevada lode Sur. #612, 34.96 feet to corner No. 3; thence S. 84.00 W. 1381.75 feet to Loc. Cor. #4; thence N. 33.45 W. 600 feet to Loc. Cor. No. 5; thence N. 84.00 E. along creek bottom, 1474.11 feet to Loc. Cor. No. 6; thence S. 33.45 E. 522.36 to Cor. No. 1, the place of beginning, containing an area of 17.862 acres Var. 30 Deg. 00 Min. E.”

5th. The defendant further alleges that at the time of making the discovery thereon hereinafter referred to the ground hereinafter described as being within the boundaries of the Canyon vein or lode was open, unoccupied, unexplored public land of the United States, save and except [8] as to any claim of the defendant Alaska-Juneau Gold Mining Company. That during the month of October, 1910, to wit, on the 8th day of October, 1910, one W. R. Lindsay, a citizen of the United States, made a discovery of rock in place bearing gold and other precious metals within the exterior boundaries of the

said Canyon vein or lode claim as hereinafter described, and the said W. R. Lindsay did thereupon locate the lode or vein within which the said mineral was so discovered by him by marking the boundaries of the claim located with substantial monuments so that the same could be readily traced upon the ground, and did, within a reasonable time thereafter and as soon as the necessary surveying could be done, post a notice on the ground and record with the District Recorder at Juneau, the recording district within which said claim was located, his notice of location, which said notice was so recorded on the 18th day of October, 1910. The claim so located was named and designated as the Canyon vein or lode; that the said Canyon vein or lode so located and situated is near or above the head of the Last Chance Basin, in the Harris Mining District, and is more particularly described as follows, to wit:

“Beginning at this notice which is situated on the left bank of Gold Creek about fifty feet up the stream from the lower Alaska-Juneau dam and about 400 feet down the stream from the lower Ebner mill in Harris Mining District, Alaska, and running 900 feet northwesterly and 600 feet southeasterly therefrom with 300 feet on each side of the center line so described. This claim is bounded on its northwesterly side by the Lotta lode mining claim U. S. Lot No. 87.”

6th. The defendant further alleges that its dam referred to in the amended complaint as being upon ground owned by the plaintiff, is in truth and in fact situated upon and within the boundaries of the de-

fendant's above-described Oregon and Canyon lode mining claims. And that the flume referred to in said amended complaint is situated upon and within the boundaries of [9] the defendant's said Oregon, Canyon and Colorado lode mining claims, extending from said dam over and across said Oregon and Canyon claims until it reaches the point where said Oregon and Colorado claims adjoin, from which point it extends across said Colorado claim until it reaches the compressor plant of the defendant, situated upon said Colorado claim, where the waters of Gold Creek conveyed thence by means of said flume are utilized.

7th. And the defendant further answering said first cause of action stated in the amended complaint herein, alleges: That on the 17th day of November, 1910, it commenced a suit to quiet the title to its above-described Oregon lode mining claims, and to all the ground embraced within the boundaries thereof, and that on the 21st day of November, 1910, it commenced a suit to quiet the title to its above-described Canyon lode mining claim and to all the ground embraced within the boundaries thereof, which suits were brought in the District Court for the District of Alaska, Division No. 1, at Juneau, against the pretended corporation styled the Ebner Gold Mining Company, the plaintiff herein, and others. That the subject matter in dispute between the parties in said suits and the subject matter in dispute in this action are the same and identical. That said suits so brought are still pending and undecided, and were so

pending and undecided at the time this action was brought.

The defendant for answer to the second cause of action stated in the amended complaint, admits, denies and alleges as follows:

1st. The defendant denies each and every allegation in said amended complaint contained with reference to said second cause of action, except that the defendant is a corporation doing business in Alaska.
[10]

2d. The defendant alleges that the plaintiff is not a corporation either *de jure* or *de facto*, and has no capacity either to sue or hold property.

2d-b. And defendant further alleges as a further defense to said second cause of action that if the plaintiff ever acquired any interest in premises and mining claims set forth in said second cause of action, neither the plaintiff nor any of his grantors or predecessors in interest did or performed or caused to be performed any work, labor or improvements of any kind and nature or description, upon or for the use and benefit of said Parish No. 2 lode claim under or by virtue of said alleged location of plaintiff, and that plaintiff and his grantors wholly failed and neglected to represent said claim or resume work thereon until long after the water and mining locations of defendants as hereinafter set forth and have *fail* to record the affidavit of annual labor and improvements required by statute, and thereby the plaintiff's claim, if any he had, became and was actually forfeited.

3d. That the defendant is the owner of and entitled to the possession of all that certain tract of min-

ing ground situated up Gold Creek, about one mile from the town of Juneau in the District of Alaska, more particularly described as follows, to wit:

“Commencing at discovery post, thence south 14 degrees west 100 feet to post No. 1, center of south end line lying on north side line of Colorado lode U. S. S. 612; thence north 84 degrees east 300 feet to post No. 2; thence north 14 degrees east 1500 feet to post #3; thence south 84 degrees west 600 feet to post #4; thence south 14 degrees west 1500 feet to post #5, identical with corner # 5 Colorado lode; thence north 84 degrees east 300 feet to post #1.”

—which said mining ground is held and claimed by this defendant under and by virtue of a certain lode mining location made by J. P. Corbus in the month of October, 1899, and known as the [11] Oregon mining claim, and also by virtue of a certain mining lode location made on July the 20th, 1910, by R. G. Datson, which said location is designated and known as the Oregon lode mining claim; that both of which said mining claims and locations were by mesne conveyances conveyed to this defendant and this defendant is now the owner thereof.

4th. That the defendant is the owner, in the possession of and entitled to the possession of a certain patented lode mining claim U. S. Survey #641, contiguous to the Oregon lode mining claims above described, and more particularly bounded and described as follows:

“Beginning at Cor. No. 1 Colorado lode, identical with Cor. 4 Royal lode Sur. No. 238,

S. E. Loc. Mon. No. 2, situate in Silver Bow Basin, bears 86.47 E. 5817 feet distance; thence S. 56.15 W. along 2-3 Nevada lode Sur. #612, 86.30 feet to Cor. No. 2, identical with Cor. No. 2, Survey No. 612; thence S. 41.15 E. along line 2-1 Nevada lode Sur. #612, 34.96 feet to corner No. 3; thence S. 84.00 W. 1381.75 feet to Loc. Cor. #4; thence N. 33.45 W. 600 feet to Loc. Cor. No. 5; thence N. 84.00 E. along creek bottom, 1474.11 feet to Loc. Cor. No. 6; thence S. 33.45 E. 522.36 to Cor. No 1, the place of beginning, containing an area of 17.862 acres—Var. 30.00 E.”

5th. The defendant further alleges that at the time of making the discovery thereon hereinafter referred to, the ground hereinafter described as being within the boundaries of the Canyon vein or lode was open, unoccupied, unexplored public land of the United States, save and except as to any claim of the defendant, Alaska-Juneau Gold Mining Company. That during the month of October, 1910, to wit, on the 8th day of October, 1910, one W. R. Lindsay, a citizen of the United States, made a discovery of rock in place bearing gold and other precious metals within the exterior boundaries of the said Canyon vein or lode claim as hereinafter described, and the said W. R. Lindsay did thereupon locate the lode or vein within which the said mineral was so discovered by [12] him by marking the boundaries of the claim located with substantial monuments so that the same could be readily traced upon the ground, and did, within a reasonable time

thereafter and as soon as the necessary surveying could be done, post a notice on the ground and record with the District Recorder at Juneau, the recording district within which said claim was located, his notice of location, which said notice was so recorded on the 18th day of October, 1910. The claim so located was named and designated as the Canyon vein or lode; that the said Canyon vein or lode so located and situated is near or above the head of the Last Chance Basin, in the Harris Mining District, and is more particularly described as follows, to wit:

“Beginning at this notice which is situated on the left bank of Gold Creek about fifty feet up the stream from the lower Alaska-Juneau dam and about 400 feet down the stream from the lower Ebner mill in Harris Mining District, Alaska, and running 900 feet northwesterly and 600 feet southeasterly therefrom with 300 feet on each side of the center line so described. This claim is bounded on its northwesterly side by the Lotta lode mining claim U. S. Lot No. 87.”

6th. The defendant further alleges that its dam referred to in the complaint as being upon ground owned by the plaintiff is in truth and in fact situated upon and within the boundaries of the defendant's above described Oregon and Canyon lode mining claims. And that the flume referred to in said complaint is situated upon and within the boundaries of the defendant's said Oregon, Canyon and Colorado lode mining claims, extending from said dam over

and across said Oregon and Canyon claims until it reaches the point where said Oregon, Canyon and Colorado claims adjoin, from which point it extends across said Colorado claim until it reaches the compressor plant of the defendant situated upon said Colorado claim, where the waters of Gold Creek conveyed thence by means of said flume are utilized.

[13]

7th. And the defendant, further answering said second cause of action, stated in the amended complaint herein, alleges: That on the 17th day of November, 1910, it commenced a suit to quiet the title to its above-described Oregon lode mining claims and to all the ground embraced within the boundaries thereof, and that on the 21st day of November, 1910, it commenced a suit to quiet the title to its above-described Canyon lode mining claim and to all the ground embraced within the boundaries thereof, which suits were brought in the District Court for the District of Alaska, Division No. 1, at Juneau, against the pretended corporation styled the Ebner Gold Mining Company, the plaintiff herein, and others. That the subject matter in dispute in this action are the same and identical. That said suits so brought are still pending and undecided, and were so pending and undecided at the time this action was brought.

The defendant, further answering said second cause of action stated in the amended complaint, alleges:

1st. That the defendant, the Alaska-Juneau Gold Mining Company, is engaged in the business of open-

ing up, developing and operating mines situated at or near Silver Bow Basin, in the District of Alaska, and that said corporation is the owner of and in the possession of a large group of mining claims, composed of thirty-one (31) patented and a considerable number of unpatented claims, situated in and near Silver Bow Basin, along Gold Creek, above the town of Juneau, in the District of Alaska. That said defendant has for many years past been operating its mines and developing the same.

2d. That the said Alaska-Juneau Gold Mining Company, the defendant herein, has for many years last past been engaged in extracting the ore from its said mines and in developing the same, and has in connection with such work erected such mills [14] and other appliances as were necessary to mill and extract the gold from the ore mined, and has in connection with its mining operations erected a thirty-stamp mill upon its said property, and pressed the development work done on said mines with all convenient speed, with a view of erecting other and larger mills and increasing its facilities for treating the ore extracted; that the development work done in connection with said mining operations has been carried so far that the erection of a two-hundred-stamp mill is now necessary to successfully carry on its said mining operations. With this end in view, the said defendant corporation has laid out a plan which includes the erection and construction of a two-hundred-stamp mill on the shore of Gastineau Channel, immediately below the town of Juneau, and the building of a tramway from said mill along the

proposed route, extending from said mill to a point on the Colorado lode mining claim, which said last-mentioned Colorado lode mining claim is owned and possessed by the said Alaska-Juneau Gold Mining Company, and lies adjacent to and joins the Oregon and Canyon lode mining claims above described, which said tramway will at its terminal connect with a tunnel to be driven from the point where such connections are made through various lode mining claims, the property of the said Alaska-Juneau Mining Company, to the point where the mining operations of said company are now being carried on. That there is flowing through, over and upon the above-described Oregon and Canyon lode mining claims a small creek carrying on an average, approximately, 25,000 or 30,000 miner's inches of water; that said creek enters the said Oregon lode mining and Canyon claims across its northerly end line and flows thence southerly across said claims; that the waters of said [15] creek so flowing across the said Oregon and Canyon claims were, on or about the first day of August, 1910, unappropriated, unused and unclaimed by any person or persons whatsoever and were flowing across said claims in their natural channel and thence on down through the Last Chance Basin and through Gold Creek Canyon into Gastineau Channel, an arm of the Pacific Ocean. That the Alaska Electric Light and Power Company has appropriated and are using a small portion of the waters of said Gold Creek, diverting the same at a point approximately one-half mile below the point where the said Gold Creek

passes out of the boundaries of the said Oregon and Canyon lode mining claims; that there are no other appropriators or users of the waters of said Gold Creek at any place between the point where the said creek enters the said Oregon and Canyon lode mining claims at its upper end and the mouth of said creek except the small portion diverted and used by the said Electric Light & Power Company as aforesaid; that all the remaining waters in the said creek on the said first day of August, 1910, were unappropriated and open to appropriation for beneficial uses, and that on or about the said first day of August, 1910, while the said waters of said Gold Creek were thus unappropriated and unused, except in so far as they were appropriated and used by the said Alaska Electric Light & Power Company as aforesaid, one L. D. Mulligan, acting as agent and employee of the defendant, the Alaska-Juneau Gold Mining Company and for and on behalf of said company, located the unappropriated waters of said Gold Creek thus flowing therein as aforesaid, 20,000 miner's inches, to be diverted at a point on said Oregon lode mining claims, a short distance below the lower side line of the Lotta lode mining claim [16] referred to in the plaintiff's amended complaint herein, and did then and there post a notice of his said locations, which said notice of location is in words and figures as follows:

“KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan, of Alaska, a citizen of the United States, and over the age of twenty-one years, have appropriated and

claimed 20,000 miner's inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated by this notice, posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

(Signed) L. D. MULLIGAN.

Dated Aug. 1st, 1910."

That said notice of location was signed by said L. D. Mulligan in person, wherefore and whereupon, and on the 2d day of August, 1910, the said Mulligan made, executed and delivered to the said Alaska-Juneau Gold Mining Company his certain deed in writing, conveying to the said corporation all his right, title and interest in the waters so appropriated, which said deed of conveyance was made and executed for the purpose of vesting in the said corporation the legal title standing in the name of the said Mulligan, who, although acting as agent of the said corporation, signed said notice of appropriation in his own name. That said notice of appropriation was thereafter, and on the 8th day of August, 1910, duly and regularly recorded in the office of the District Recorder of the Juneau Recording District, the same being the district wherein said Gold Creek is located; that said notice of location was posted at or near the proposed point of diversion on the Oregon lode and Canyon lode mining claims above described; that immediately after the posting of said notice, and

upon the said 1st day of August, 1910, the said Alaska-Juneau Gold Mining Company commenced work looking towards the diversion and appropriation of the waters flowing in said Gold Creek over and above any [17] excess appropriated by the said Alaska Electric Light & Power Company to the extent of 20,000 miner's inches as claimed in said notice, and that a crew of men has been continuously at work in the construction of pipe, flume and ditch lines as well as the construction of a dam at the point of diversion, all of which dam, pipe, flume and ditch lines are intended to and will be used for the purpose of so diverting the said waters of Gold Creek appropriated and located as aforesaid, and such work in connection with the diversion of said waters has been carried on by said company with as much speed as the conditions would permit of and without cessation or delay, and is still being so carried on, and will be pressed forward until the waters have been diverted and applied in accordance with the original intention; that the waters so appropriated were appropriated for the purpose of generating power and for other beneficial uses in connection with the operation of the two-hundred-stamp mill to be built on the shore of Gastineau Channel as hereinbefore stated, and for the purpose of driving a compressor plant situated on the Colorado claim and for other uses in connection with its mining operations; that it is the intention and purpose of the said defendant, the Alaska-Juneau Gold Mining Company, to press the work of diverting the said waters and of conducting the same through pipes and flumes to the

said proposed mill with as much speed as the weather and other conditions will admit of and without cessation or delay, and to erect said mill and have the same in readiness, and to commence the construction of said mill as soon as the necessary material can be obtained and placed upon the ground, and to press said work to completion, and it is the intention of the said company to divert the waters of Gold Creek by means of [18] said dam, flumes and pipe-lines as soon as the weather and other conditions will permit, and to apply the same in connection with the operation of said two-hundred-stamp mill and said other uses, the same being the beneficial uses designed. That the use of all the said waters so appropriated to the extent of said entire 20,000 inches will be necessary in the operation of the said mill. That the dam situated on the Oregon and Canyon claims as aforesaid has been completed as well as the flume line extending from said dam over and across said Oregon and Canyon claims to a point on the Colorado claim above described, where a compressor plant has been constructed by the defendant; that the waters of Gold Creek have been diverted by means of said dam and are now being conveyed to said compressor plant by means of said flume, where the same are applied and used for the purpose of generating power used by the defendant in driving the tunnel hereinbefore referred to, and for other purposes in connection with the construction of such works as are necessary in order to carry out its above referred to scheme of development adopted in connection

with the operation of its mine. That on the 8th day of May, 1911, the defendant posted its amended notice of the appropriation of the water already appropriated and claimed under the notice above set out, which said amended notice was posted at the point of diversion as described and located in said notice, and was thereafter and on the said 8th day of May, 1911, duly and regularly recorded in the office of the Recorder for the Juneau Recording District, the same being the district in which all the points herein referred to in connection with the water so to be appropriated and the use thereof are situated. Said amended notice so posted and recorded is in the words and figures as follows: [19]

“NOTICE IS HEREBY GIVEN that, whereas, the Alaska-Juneau Gold Mining Company did, by its agent, L. D. Mulligan, posting a notice from the waters appropriating 20,000 inches of water from the waters flowing in Gold Creek, which notice is in words and figures as follows:

‘KNOW ALL MEN BY THESE PRESENTS: That, I, L. D. Mulligan, of Alaska, a citizen of the United States and over the age of twenty-one years, have appropriated and claimed 20,000 miner’s inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated in this notice, posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

L. D. MULLIGAN.

Dated Aug. 1st, 1910.'

And whereas, the said L. D. Mulligan acted as the agent of the undersigned in this connection, who is now the owner and holder of said right so located by said Mulligan by virtue of such agency and by virtue of conveyances from said Mulligan:

Now, therefore, the undersigned, not waiving any of its right or abandoning any of the rights belonging to it under and by virtue of said above-described notice and the work of diverting the water of Gold Creek appropriated by reason thereof, and done pursuant thereto, but for the purpose of giving a more accurate and detailed description of the beneficial uses to which said water is to be put and the place and places where the same is to be used when diverted and applied under the aforesaid notice and of the means whereby the same is to be conveyed to such place of intended use, hereby posts and records this additional and amended notice of appropriation of water, and gives notice to all persons whatsoever that it claims and appropriates under and by virtue of such original [20] notice as well as this amended notice 20,000 miner's inches of the waters of Gold Creek measured under a four-inch pressure for mining, milling power and other beneficial uses, to be diverted from said creek at a point at or near the place where this notice is posted, the same being posted on the banks of Gold Creek about one mile and one-eighth ($1/8$) above the town of Juneau

about 500 feet below the Ebner mill and about 1250 feet above the Jualpa Dam and immediately at the point where the dam of the Alaska-Juneau Gold Mining Company has been constructed and where the water is diverted under the above-mentioned location notice, signed by L. D. Mulligan. The water so appropriated and claimed under said notice of L. D. Mulligan and hereunder is to be diverted from Gold Creek at that point, and conveyed by means of pipes, flumes, ditches and other means of conveyances, along a proposed route running above the southerly side of the Last Chance Basin and thence around Swede Hill to a point at or near Jorgenson sawmill, on the shore of Gastineau Channel, where the same is to be applied and used for the purpose of generating power and for other purposes to be used in connection with the operation of a stamp-mill at or near that point, and a portion of the water so diverted and appropriated is to be used at a point on the Colorado claim near Snow Slide Gulch for the purpose of driving a compressor plant at that point and for the purpose of generating power at that point and these waters so used on said Colorado claim will be conveyed by a pipe, flume, ditch along the route above indicated and taken from said pipe, flume and ditch to the extent so necessary at said last-mentioned place if used for the purpose of furnishing power at that point as above stated. The remainder of the water carried not used at this point, at any time to be [21] applied in connection with the operation of the stamp-mill to be built near the Jorgenson sawmill as above stated.

Notice is expressly given that the undersigned has not abandoned or waived any of the rights acquired under and by virtue of the notice of said L. D. Mulligan or by virtue of any of the work it has heretofore performed looking towards the diversion and appropriation of the waters of Gold Creek or any other right or rights whatsoever it has at this present time to the waters of said creek.

Posted on the ground this 8th day of May, 1911.

ALASKA-JUNEAU GOLD MINING CO.

By ROBERT A. KINZIE,

Agent and General Superintendent."

3d. That said flume and ditch used for the diversion of the waters of Gold Creek as aforesaid is constructed over and across a portion of the Oregon and Canyon claims in conflict with the alleged Parish No. 2 claim as described in the complaint.

4th. That the pretended Parish No. 2 and Oregon and Canyon claims are all unpatented mining claims, and the ground within the boundaries of said claims wholly belongs to the unpatented public domain of the United States, claimed under said pretended Parish No. 2, Oregon and Canyon locations but not otherwise claimed, located or held by anyone except the United States, and has never been in the actual and physical possession of anyone except the defendant.

5th. That in order that the mines of the Alaska-Juneau Gold Mining Company may be worked to advantage, it is necessary that the plans above delineated and described be carried out to its fullest extent in every detail and that the [22] water of

Gold Creek be conveyed to the proposed site of the mill to be erected and there used to generate the power with which said mill can be operated, and also that said water be conveyed to the compressor plant now situated on the Colorado plant and there used for the purpose of generating power and other purposes and uses in connection with the driving of the tunnels above described and the operation of the mines. That the water of Gold Creek cannot be diverted and carried to either point and applied to the uses indicated, unless the same be diverted approximately at the point where the dam is now built and where the same are now being diverted and carried by means of pipes, flumes and ditches along the ditch and flume-line above described extending over and across the land embraced within the unpatented Oregon claims and the other pretended unpatented conflicting claims and the said water cannot be diverted and appropriated for use in connection with the operations of the defendant's mines, unless a ditch, flume and pipe-line be built across said ground and along the route indicated above from the point of diversion to the place of use.

6th. That gold was first discovered in Alaska in about the year 1880, that some of the mining claims now owned and operated by the defendant's company were the first quartz locations made in the District of Alaska and were made at about that time. That the newly discovered district was named the "Harris Mining District" after its discoverer. That the topographical and climatic conditions of South-eastern Alaska, the territory in which the new dis-

covery was made were such that the soil was not adapted for any other purposes, except that here and there some small gardens may possibly be made where some few vegetables that need not be ripened in [23] order to make them fit for use could be produced, and that the doctrine of riparian right was wholly inapplicable to the territory of Alaska and to the conditions obtainable there. That Gold Creek as well as all and singular the property rights and other places connected with the same to which reference is made in this answer are situated within the boundaries of the Harris Mining District. That at a meeting of the miners of the Harris Mining District held in the year 1882, the miners of said district duly and regularly adopted the following rules with reference to the diversion and appropriation of water;—

“Article 1. The right to use the running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

Art. 2. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

Art. 3. The person entitled to the use may change the place of diversion, if others are not injured by such change and may extend the ditch, flume, pipe or aqueducts by which the diversion is made to place beyond that where the first use was made.

Art. 4. A water appropriation may be turned into channel of another stream and mingled with its waters and then reclaimed, but in reclaiming it the

water already appropriated by another must not be diminished.

Art. 5. As between appropriators, the one first in time is the one first in right.

Art. 6. A person desiring to appropriate water must [24] post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: First: He claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure. Second: The purpose for which he claims it, and the place of intended use. A copy of the notice must within ten (10) days after it is posted be recorded in the books kept by the recorder of the district.

Art. 7. Within twenty days, during the working season, after the notice is posted, the claimant must commence the excavations or construction of the works, in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by rain or snow.

Art. 8. By 'completion' it is meant conducting the waters to the place of intended use.

Art. 9. By a compliance with the above rules, the claimant's right to the use of the water related back to the time the notice was posted.

Art. 10. A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.

Art. 11. Persons who have heretofore claimed the right to water and who have not diverted nor applied

it to some useful purpose, must after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.”

That all and singular said rules and regulations have been and remain in force and have been universally observed by the miners of the Harris Mining District at all [25] times since and are still being so observed and are in all respect in full force and effect.

7th. That ever since the discovery of gold in Alaska as above indicated, and up to the present time, certain customs have been in force and have been observed universally by the miners of the Harris Mining District, the same being the district within which Gold Creek and all and singular the matters in dispute in this action are situated, and also by the miners in the territory outside of the said Harris Mining District, lying in the vicinity of Juneau as well as all the various mining districts lying in *which* is known as Southeastern Alaska. That according to the customs of the miners of said territory so described the riparian owner requires no right to the water flowing within the stream by reason of such ownership, but the right to the use of such water could and can be acquired only by diversion appropriation and application to a *beneficiary* use. That all and singular the rules adopted by the miners of the Harris Mining District as above indicated were and are observed by all the miners in the territory known as Southeastern Alaska, and all and singular the rights and liabilities conferred by or existing under, or by virtue of said rules, existed under and are

recognized by the customs of the miners of Southeastern Alaska, which said customs are uniformly and universally recognized and adhered to by all the miners residing in or operating within said territory embraced in what is known as Southeastern Alaska, and like customs are also recognized and existing in all the various districts within the territory of Alaska. That, by these customs of the miners, right to the use of water can be acquired only in the manner indicated by the rules of the [26] miners above referred to and the failure to comply with these rules and customs in accordance with the customs of miners above referred to, work a forfeiture against whoever fails to comply with said rules and customs and according to said customs, all rights are forfeited by the person acquiring the same upon a failure on his part to take any one or more of the succeeding steps, required to be taken by him under said rules and customs; that is, the rules adopted by the miners of the Harris Mining District as above stated are in all respects identical with the customs of the miners universally observed and recognized by the miners in all mining districts of Southeastern Alaska, including the Harris Mining District, and also recognized by the miners of the entire territory of Alaska in accordance with said customs that the riparian proprietor has no right as such to the use of the water flowing in the stream and the right thereto can be acquired only in the manner above indicated.

That according to the customs of the miners, recognized and observed in the Harris Mining District as well as in all the other mining districts above re-

ferred to, including all mining camps situated in the Southeastern Alaska, the right to construct ditches and flumes to be used in connection with the diversion and appropriation of water, over and across all portion of the public domain of the United States claimed by mineral claimants, whether said ground be claimed and held under lode placer location, exists and is recognized and has existed and has been recognized at all times since gold was first discovered in Alaska, under which said custom each miner or person operating a mine has a right to go upon the unpatented mining claims of others and construct ditches and flumes over and across the same for the purpose of diverting and [27] appropriating water and conveying the same to any point where he may intend to apply the same to a beneficial use connected with the operation of his mine, the sluicing of his gravel or the milling of his ores.

That all and singular the above referred to customs and rights existing thereunder are universally and uniformly observed and recognized by all the miners residing, not only in the Harris Mining District but in all the various mining districts of Southeastern Alaska as well as those of other portions of the territory of Alaska, and have been recognized and have so existed as long as mining operations have been carried on in any and all the various districts.

8th. That the work done in the excavation by the defendant's company in no wise damages the ground across which said flume-line has been built, and that the construction and maintenance of said flume-line in no way interfere with the use of the ground across

which same has been built for mining or other purposes, and in no wise hinders or interfered with the mining of the ores contained within any of the mining claims across which same has been built or constructed, and add to and in no wise detracts from the value of the same or any of them.

9th. That the right of use of water acquired by diversion, appropriation and application to beneficial use, as recognized by the above referred to customs as well as the right to construct ditches and flumes for the purpose of diverting and conveying water, has been and is recognized by the decision of the Courts of Alaska.

WHEREFORE, the defendant prays that the plaintiff's amended complaint be dismissed and that they and each of them recover the costs and disbursements in this behalf incurred.

SHACKLEFORD & BAYLESS,

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant. [28]

United States of America,
District of Alaska,—ss.

I, Robert A. Kinzie, being first duly sworn, on oath say: That I am the agent and general Superintendent of the Alaska-Juneau Gold Min. Co. in the above-entitled action; that I have read the foregoing answer and know the contents thereof, and believe the same to be true; that I make this verification because.

ROBT. A. KINZIE.

Subscribed and sworn to before me this 12th day of May, A. D. 1911.

JAMES CHRISTOE,
Notary Public for Alaska.

Due service of a copy of the within is admitted this 12 day of May, 1911.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Company, Defendant. Answer. Filed May 12, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. J. A. Hellenthal, Attorney for Defendant. Office: Juneau, Alaska. [29]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Motion to Strike.

Comes now the above-named plaintiff, by its attorneys, Winn & Burton, and moves to strike from the answer herein of the above-named defendant all the following, to wit:

I.

All of paragraph VII of said answer, for the reason that the matters set up therein are immaterial and irrelevant matters, and do not in any wise constitute a defense to the matters and facts set forth in the complaint.

II.

Moves to strike from said answer all of paragraphs I, II, III, IV, V, and VI and each and all of the subdivisions of paragraph VI which are referred to as Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11; all of paragraphs VII, VIII and IX, from the defendant's further answer to the second cause of action stated in the complaint, for the reason and upon the ground that each and all of said paragraphs set forth irrelevant and immaterial matters, and the matters and facts set forth in each and all of said paragraphs constitute no defense to the matters, facts and allegations contained in the complaint herein; that said action set [30] forth in the complaint herein is a simple action in ejectment, and the matters and facts set forth in the paragraphs moved against constitute no defense to the said suit in ejectment and are immaterial, and do not tend to defeat the rights of the defendant to recover by reason of the cause or causes of action set forth in said complaint.

III.

Moves to strike from the defendant's answer to the third cause of action stated in the complaint the following, to wit: All of paragraph IV, for the reason that the same is irrelevant and immaterial matter, and the matters and facts so set forth in said para-

graph constitute no defense to any of the matters and facts set forth in the complaint or any of the causes of action set forth in said complaint.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 235-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mg. Co., Plaintiff, vs. Alaska-Juneau Gold Mg. Co., Defendant. Motion to Strike. Filed May 15, 1911. E. W. Pettit, Clerk. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ——. [31]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
Defendant.

Order Denying Plaintiff's Motion to Strike.

J. R. Winn, Esquire, appearing for the plaintiff, and L. P. Shackelford, Esquire, and J. A. Hellenthal, Esquire, appearing for the defendant, and this cause coming on regularly for hearing upon the motion of plaintiff to strike certain portions from the answer herein, after argument by the respective counsel, said

motion is denied; to which ruling of the Court plaintiff excepts and such exception is allowed.

Done in open court this 15th day of May, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal H, page 123. [32]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Demurrer.

Comes now the above-named plaintiff by its attorneys, Winn & Burton, and demurs to the defendant's further answer to the second cause of action stated in the amended complaint, and for cause of demurrer states:

I.

That the said further answer to the said second cause of action stated in the said amended complaint does not state facts sufficient to constitute a defense to the matters and facts set forth in the second cause of action of said amended complaint.

II.

Plaintiff also demurs to defendant's answer to the

third cause of action stated in the amended complaint, for the reason and upon the ground that the same does not state facts sufficient to constitute a defense to the matters and facts set forth in the third cause of action of said amended complaint.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Demurrer. Filed May 16, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ——. [33]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant.

Defendant.

Order Overruling Plaintiff's Demurrer.

This cause coming on regularly for hearing upon the demurrer of plaintiff to defendant's further answer to the second cause of action stated in the

amended complaint herein, J. R. Winn, Esquire, appearing for the plaintiff, and L. P. Shackleford, Esquire, and J. A. Hellenthal, Esquire, appearing for the defendant, after argument by respective counsel, and the Court being fully advised in the premises, said demurrer is overruled, to which ruling plaintiff excepts and the exception is allowed.

Done in open court this 16th day of May, 1912.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal H, page 128. [34]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant.

Reply to Answer.

Comes now the above-named plaintiff and replying to the answer herein of the above-named defendant states:

I.

Referring to the second paragraph of said answer, this plaintiff alleges that it is a corporation, organized and existing as stated in the amended complaint

herein and has been acting as such corporation transacting business in the said District of Alaska for more than fifteen years, and has transacted business with the said defendant herein and has at all times been recognized by the said defendant as a corporation and entitled to transact business as such and to perform all the other functions of a corporation.

II.

Referring to paragraph III of said answer, this plaintiff denies the same and each and every portion thereof, and states further in respect to said paragraph that if the said J. P. Corbus ever did undertake to make a location of a mining claim called the Oregon, that said attempted location was made on behalf of and for the said defendant and was attempted to be made over, in and upon the mining claims belonging to the plaintiff set out and described in the amended complaint herein, and was attempted [35] to be made over, in and upon said claims or some portion thereof while the plaintiff herein, or its predecessors in interest or grantors, were the owners and in possession of each and all of said claims and after the said Lotta claim set forth and described in the amended complaint herein was patented and while the said Parish No. 2 mining claim described in the amended complaint were valid and subsisting claims, held, owned and possessed by the plaintiff herein or its grantors by reason of prior discovery, location, staking and marking of the boundaries, posting of notices and recording of the same and by a full compliance with the laws of the United States pertaining

to the performance of annual assessment work thereon, and that if said Corbus ever attempted to locate the premises described in the answer as the Oregon claim for or on behalf of himself or said defendant, the said attempted location and said claim to the premises described in said answer as the Oregon claim were afterwards abandoned and forfeited by reason of said defendant and its agent and representative, Corbus, failing in all respects to comply with the laws of the United States and local customs, rules and regulations pertaining to the performance of the annual assessment work on said pretended lode mining claim; that the said defendant, nor its predecessors in interest, nor the said Corbus, never performed any assessment work on said claim whatsoever and never attempted to comply with the law in regard to performing the necessary annual assessment work on said pretended location;

And this plaintiff further alleges that if the said R. G. Datson mentioned in said paragraph ever attempted to make any location of what is termed the Oregon lode mining claim in the year 1910, that said Datson attempted to make the same on behalf [36] of the said defendant herein, and any and all attempted locations made by the said Datson were in, over and upon the property, mining claims and premises owned and possessed by the plaintiff herein, as set forth and described in the amended complaint, and was an attempt to make a location over, in and upon the Lotta patented claim, the Taku Gold & Silver claim, patented, and the Parish No. 2, the latter mining claim being prior, subsisting and valid

locations owned, held and possessed by this plaintiff by reason of prior discovery, location, marking on the ground, posting and recording of notice and in full compliance with the laws of the United States in respect to holding mineral land and in complying with the law, local rules and regulations pertaining to the performance of annual assessment work thereon, and was an attempt made by the said Datson on behalf of said defendant company to relocate the said pretended Oregon claim as located by the said Corbus, in the manner hereinbefore set forth, and said attempted location by said Datson on the part of said defendant was false, fictitious and void, and was made, as this plaintiff verily believes, to harass and annoy said plaintiff and becloud the title to its said property.

III.

Referring to paragraph IV of the said answer to the amended complaint herein, this plaintiff denies the same and each and every portion thereof, and alleges that if said defendant is the owner and possessed of a certain patented mining claim known as United States Survey 641 and termed the Colorado Claim, the only premises or property that was ever patented by reason of said instrument and the only ground that was ever patented by [37] virtue of said survey as described and located upon the ground by the monuments and actual measurements, irrespective of anything that may be asserted in said patent, is bounded and described as follows, to wit:

Beginning with Corner No. 1 of the Colorado lode, Survey No. 641, identical with Corner No.

4 of the Royal, Survey No. 238; thence south $58^{\circ} 24'$ west 86.30 feet to Corner No. 2, identical with Corner No. 2 of the Nevada Lode, Survey No. 612; thence south $39^{\circ} 06'$ east 34.96 feet to Corner No. 3; thence north $88^{\circ} 30'$ west 1123.16 feet to Corner No. 4 identical with Corner No. 1 of the Idaho Placer, Survey No. 641; thence north $31^{\circ} 36'$ west 600 feet to Corner No. 5, identical with Corner No. 6 Idaho Placer, Survey No. 641 and Corner No. 3 Last Chance Placer, Survey No. 142; thence south $88^{\circ} 54'$ east 1215.12 feet to Corner No. 6 on line 5-4 Royal Lode, Survey No. 238, whence Corner No. 5 Royal Lode bears north $31^{\circ} 36'$ west 567.64 feet, thence south $31^{\circ} 36'$ west 522.36 feet to Corner No. 1, the place of beginning.

That said Colorado claim was patented as a subsequent and junior mining claim to the other mining claims which it lies between, and only as a matter of fact contains the ground embraced within the exterior boundary lines above described and set forth.

IV.

Referring to paragraph V of said answer to the amended complaint, this plaintiff denies the same and each and every portion thereof, and alleges that if the said Lindsay mentioned in said paragraph did attempt to make a location of the premises described in said paragraph as a mining claim, the same was invalid, for the reason that the said attempted location was made on behalf of said defendant by said Lindsay in, over and upon the Lotta patented claim and the Parish No. 2 mining claim, being the same

Lotta and Parish No. 2 mentioned and described in the amended complaint herein, and said attempted and pretended location was made at the time that said Lotta was a patented claim, owned and held and in the actual possession of this plaintiff, and while the said Parish No. 2 was owned and held and in the actual possession of this plaintiff, by reason of [38] prior discovery, location, marking of boundaries, posting and recording of notices and while the same was a valid and subsisting mining claim by reason of this plaintiff having complied with all the laws, rules and regulations with respect to performing the annual assessment work thereon, and said location was made for the purpose of harassing and annoying this plaintiff more particularly for the reasons hereinafter set forth in this reply, and also was and is an attempt of defendant to relocate a part of the old Oregon claim, which it has abandoned and forfeited as heretofore alleged in this reply.

IV.

Referring to paragraph VI of the answer to the amended complaint herein, this plaintiff denies the same, and each and every portion thereof.

And this plaintiff replying to the answer of the defendant to the second cause of action set forth in the amended complaint, states and alleges as follows:

I.

That this plaintiff alleges it is a corporation as stated in the amended complaint herein, and has been carrying on and conducting business in the District of Alaska as alleged in the said amended complaint and set out herein; has dealt with said corporation

during said period of time as a corporation, recognizing its legal existence and capacity to hold property and do and transact business in Alaska.

II.

Referring to paragraph III of the answer to the second cause of action herein, this plaintiff denies the same and each and every portion thereof, and states further in respect to said [39] paragraph that if the said J. P. Corbus ever did undertake to make a location of a mining claim called the Oregon, that said attempted location was made on behalf of and for the said defendant and was attempted to be made over, in and upon the mining claims belonging to the plaintiff set out and described in the amended complaint herein, and was attempted to be made over, in and upon said claims or some portion thereof while the plaintiff herein, or its predecessors in interest or grantors, were the owners and in possession of each and all of said claims and after the said Lotta claim, set forth and described in the amended complaint herein, was patented and while the said Parish No. 2 lode mining claim described in the amended complaint were valid and subsisting claims, held, owned and possessed by the plaintiff herein or its grantors, by reason of prior discovery, location, staking and marking of the boundaries, posting of notice, and recording of the same and by a full compliance with the laws of the United States pertaining to the performance of annual assessment work thereon, and that if said Corbus ever attempted to locate the premises described in the answer as the Oregon claim for or on behalf of himself or said defendant, the

said attempted location and said claim to the premises described in said answer as the Oregon claim were afterwards abandoned and forfeited by reason of said defendant and its agent and representative, Corbus, failing in all respects to comply with the laws of the United States and local customs, rules and regulations pertaining to the performance of the annual assessment work on said pretended lode mining claim; that the said defendant, nor its predecessors in interest, nor the said Corbus, never performed any assessment work on said claim whatsoever, and never attempted [40] to comply with the law in regard to performing the necessary annual assessment work on said pretended location.

And this plaintiff further alleges that if the said R. G. Datson mentioned in said paragraph ever attempted to make any location of what is termed the Oregon lode mining claim in the year 1910, that said Datson attempted to make the same on behalf of the said defendant herein, and any and all attempted locations made by the said Datson were in, over and upon the property, mining claims and premises owned and possessed by the plaintiff herein, as set forth and described in the amended complaint, and was an attempt to make a location over, in and upon the Lotta patented claim, the Taku Gold and Silver claim, patented, and the Parish No. 2 lode mining claim, the latter mining claims being prior, subsisting and valid locations, owned, held and possessed by this plaintiff by reason of prior discovery, location, marking on the ground, posting and recording of notices and in full compliance with the laws of

the United States in respect to holding mineral land and in complying with the law, local rules and regulations pertaining to the performance of annual assessment work thereon, and was an attempt made by the said Datson on behalf of said defendant company to relocate the said pretended Oregon claim as located by the said Corbus, in the manner hereinbefore set forth, and said attempted location by said Datson on the part of said defendant was false, fictitious and void, and was made, as this plaintiff verily believes, to harass and annoy said plaintiff and becloud the title to its said property.

III.

Referring to paragraph IV of the answer to the second cause of action herein, this plaintiff denies the same and each [41] and every portion thereof, and alleges that if said defendant is the owner and possessed of a certain patented mining claim known as United States Survey 641 and termed the Colorado claim, the only premises or property that was ever patented by reason of said instrument and the only ground that was ever patented by virtue of said survey as described and located upon the ground by the monuments and actual measurements, irrespective of anything that may be asserted in said patent, is bounded and described as follows, to wit:

Beginning with Corner No. 1 of the Colorado lode, Survey No. 641, identical with Corner No. 4 of the Royal, Survey No. 238; thence south $58^{\circ} 24'$ west 86.30 feet to Corner No. 2, identical with Corner No. 2 of the Nevada lode, Survey No. 612; thence south $39^{\circ} 06'$ east 34.96 feet to

Corner No. 3; thence north $88^{\circ} 30'$ west 1123.16 feet to Corner No. 4, identical with Corner No. 1 of the Idaho Placer, Survey No. 641; thence north $31^{\circ} 36'$ west 600 feet to Corner No. 5, identical with Corner No. 6 Idaho Placer, Survey No. 641 and Corner No. 3 Last Chance Placer, Survey No. 142; thence south $88^{\circ} 54'$ east 1215.12 feet to Corner No. 6 on line 5-4 Royal lode, Survey No. 238, whence Corner No. 5 Royal lode bears north $31^{\circ} 36'$ west 567.64 feet; thence south $31^{\circ} 36'$ east 522.36 feet to Corner No. 1, the place of beginning.

That said Colorado claim was patented as a subsequent and junior mining claim to the other mining claims which it lies between, and only as a matter of fact contains the ground embraced within the exterior boundary lines above described and set forth.

IV.

Referring to paragraph V of the answer to the second cause of action herein this plaintiff denies the same and each and every portion thereof, and alleges that if the said Lindsay mentioned in said paragraph did attempt to make a location of the premises described in said paragraph as a mining claim, the same was invalid, for the reason that the said attempted location was made on behalf of said defendant by said Lindsay in, over and upon the Lotta patented claim and the Parish No. 2 mining claim, [42] being the same Lotta and Parish No. 2 mentioned and described in the amended complaint herein, and said attempted and pretended location

was made at the time that said Lotta was a patented claim, owned and held and in the actual possession of this plaintiff and while the said Parish No. 2 was owned and held and in the actual possession of this plaintiff, by reason of prior discovery, location, marking of boundaries, posting and recording of notices and while the same was a valid and subsisting mining claim, by reason of this plaintiff having complied with all the laws, rules and regulations with respect to performing the annual assessment work thereon, and said location was made for the purpose of harassing and annoying this plaintiff, more particularly for the reasons hereinafter set forth in this reply, and also was and is an attempt of defendant to relocate a part of the old Oregon claim, which it has abandoned and forfeited as heretofore alleged in this reply.

V.

Referring to paragraph VI of defendant's amended and supplemental answer, this plaintiff denies the same and each and every allegation therein contained.

Referring to the further answer of defendant to the second cause of action stated in the amended complaint, this plaintiff admits, denies and alleges as follows:

I.

Referring to paragraph I thereof, this plaintiff has not knowledge or information sufficient to form a belief as to the matters and facts set forth therein, and therefore denies the same and each and every portion thereof. [43]

II.

Referring to paragraph II of the said further answer, this plaintiff denies the same and each and every portion thereof, except in so far as it has been in this reply or may be hereafter admitted, modified or explained. And in connection with said paragraph and the matters set forth therein this plaintiff further alleges, that if the said L. D. Mulligan ever posted a notice of the kind and nature set forth on page 10 of said answer, purporting to be dated August 1, 1910, that said notice was posted at a point fully 150 feet up Gold Creek from where the defendant has constructed its dam and was posted near the centre of the patented Lotta lode claim herein referred to, and said notice and all work thereunder was abandoned by the said defendant and was never of any validity as a water notice and was posted upon the patented ground of this plaintiff company, and for said reasons mentioned herein was absolutely void both in law and in fact.

This plaintiff referring to said paragraph and the pretended amended location notice of appropriation of water, which commences on page 13 and ends on page 15, alleges, that if any such notice was ever made out and posted by the said defendant and was posted as indicated in said notice, it was posted at a distance down the creek from the original notice which the said Mulligan claimed he posted, a distance of about 150 or 200 feet, and was either on the Lotta patented claim or the Parish No. 2 mining claim, property of this plaintiff company, and that said pretended notice, if posted and recorded as is claimed

by the defendant, is of no validity whatever as a water location or as an amended water location, for the reasons set forth herein.

III.

Referring to paragraph III of said last-mentioned answer, '[44]' this plaintiff denies the same and each and every portion thereof, except that said flume and ditch referred to therein is constructed across a part of and in part over the Parish No. 2 claim and was so constructed in the manner hereinafter set forth.

IV.

Referring to paragraph IV, this plaintiff admits that the Parish No. 2 mining claim is an unpatented claim, but denies each and every other portion, part and remaining allegation of said fourth paragraph.

V.

Referring to paragraph V of said last mentioned answer, this plaintiff denies the same and each and every portion thereof.

VI.

Referring to paragraph VI of said answer, this plaintiff denies that the pretended rules and regulations set forth in said paragraph are now or ever have been in force since either party to this action sought to acquire title to any of the property described and set forth in the pleadings herein; denies that any such rules and regulations ever have been universally or otherwise observed by the miners of the Harris Mining District, at this time or any other time, or that they are now or ever have been in force and effect; as to the remaining portions of said para-

graph VI, this plaintiff has not knowledge or information sufficient to form a belief as to the matters and facts set forth therein, and therefore denies the same and each and every portion thereof.

And this plaintiff further alleges in connection with the matters and facts set forth in said paragraph, that if any such [45] mining rules or regulations were ever in existence, they were specially repealed by the Act of May 17, 1884, being an Act entitled "An Act Providing a Civil Government for Alaska," 23 Stats. at Large, which provided for the organization of a civil government in Alaska, the extension thereof of the laws of Oregon and in Section 8 as follows: "And the laws of the United States relating to mining claims and the rights incident thereto shall, from and after the passage of the act, be in full force and effect in said district under the administration thereof herein provided for, subject to such regulations as may be made by the secretary of the interior, approved by the President."

And if any such mining rules or regulations as set forth in said paragraph ever existed or were in force, they fell into utter disuse and were abandoned before either party to this suit ever made any claim to any of the unpatented land or mining claims in dispute in this action, and any of said mining rules so set forth therein that are inconsistent with the general laws of the United States are of no force or effect whatsoever.

That none of said rules or regulations that are inconsistent with the laws of the United States have ever been recognized by the courts of the District

of Alaska since either party to this action made any claim to the property in dispute herein; in fact, the courts have held that if any such rules and regulations ever did exist, that they fell into disuse long before either the plaintiff or the defendant in this suit made any claim to the property in dispute herein, and particularly so was it held in the case of *McFarland et al. vs. The Alaska Perseverance Mining Co.*, No. 510-A of this court, by Judge James Wickersham, the presiding Judge, and which opinion is on file in said cause; the said cause was afterwards appealed to the Circuit Court of Appeals [46] and the decision of the said Wickersham affirmed. Said opinion was rendered by the said Wickersham on June 3, 1907, and was over mining property and water rights within what the defendant herein terms the Harris Mining District and within a short distance from the property in dispute in this suit.

VII.

Referring to paragraph VII of said answer, this plaintiff denies the same and each and every portion thereof, and states that if any of said customs mentioned in said paragraph ever existed, the same, by reason of the facts set forth in paragraph VI of this Reply, were repealed and are of no force and effect, and had fallen into utter disuse before ever either of the parties herein made any claim to the mining claims or any water or water rights as set forth in said answer.

VIII.

Referring to paragraph VIII of said answer, this

plaintiff denies the same and each and every portion thereof.

IX.

Referring to paragraph IX of said answer, this plaintiff denies the same and each and every portion thereof.

And further by the way of affirmative matter as a defense to the matters and facts set forth in the amended and supplemental answer to the amended complaint herein, this plaintiff alleges:

I.

That it is a corporation organized and existing as heretofore alleged in this reply, and said allegations respecting said [47] corporation are hereby referred to and made a part of this *part of this* reply.

II.

That this plaintiff is a corporation organized as hereinbefore stated and came into existence in the year 1895, and at that time and since that time has become the owner and has been in possession of a group of quartz mines and mining claims in what is termed the Harris Mining District, on Gold Creek, a distance of about one mile from the town of Juneau; all of which said claims are contiguous and adjacent to each other, with no intervening ground or mining claims owned or possessed by any other person or corporation; and said group consists of the Lotta patented claim, set forth in the complaint herein, and some seven or eight other patented claims, and the Parish No. 2 and Parish, two unpatented claims referred to in the complaint herein, together

with several other unpatented claims and several millsites.

That the creek known as Gold Creek and referred to in the pleadings herein runs through and across said mining claims for a distance of about three-quarters of a mile.

That before this plaintiff company became the owner and possessed of said mining claims and millsites, some of the said claims had been owned and possessed by this plaintiff's predecessors in interest and grantors, and they had erected on one of said claims or millsites, at or near the upper end of said group on Gold Creek, a ten-stamp mill and were engaged for several years before this plaintiff became the owner of said property in opening up and developing said mining claims and in mining and milling the ore therefrom, and had all the necessary machinery and equipment for mining and milling the ore in said [48] ten-stamp mill and did run and operate said mill for several years prior to this plaintiff becoming the owner of said property and used the water of Gold Creek for the purpose of generating power, in opening up and developing said mines and milling said ore, and said creek was tapped by the intake of the predecessors in interest and grantors of this plaintiff at a point just above the mill, which said mill is located on the right-hand bank going up the creek.

III.

That about the year of 1895, upon the organization of this plaintiff as a corporation, the property above described, except a few locations that have been made

since then, were conveyed to said corporation.

That the locations that have been made by and on behalf of this plaintiff, or conveyed to it, since said date are the Parish No. 2 claim and Parish, and which was located by William M. Ebner on the 24th day of October, 1899, and afterwards and on the 29th day of March, 1906, conveyed by the said Ebner to this plaintiff; conveyed to this plaintiff, and ever since said date said two mining claims have formed a part of the group of the property referred to herein as the plaintiff's property on Gold Creek; and said plaintiff has been in the open, notorious and actual possession of all of said property during all of said times mentioned herein and ever since the conveyance of said Parish No. 2 and the Parish to it, and ever since it first became the owner of said property in 1895 has been continuously engaged in opening up and developing and mining of its said property, milling its ore with its said 15-stamp mill, and has built and constructed necessary ore-bunkers, an air-compressor and all the necessary buildings, and had the necessary machinery [49] placed thereon for the working of said mines in a good workmanlike style and fashion, and has been using the water of Gold Creek at all of said times to generate the power therefor.

IV.

That in contemplation of the increasing of the facilities to open up, develop and mine said property and the milling of said ores, this plaintiff located, or caused to be located, for itself and successors in interest, ten thousand additional miner's inches of

water of Gold Creek, on the 20th day of June, 1910, which said location was made by H. T. Tripp for and on behalf of this plaintiff and its successors in interest and afterwards recorded in the Recorder's Office at Juneau, Alaska, that being the Recording District, in which said mining property is situated, and which said location notice reads as follows, to wit:

“Location of Water.

“Notice is hereby given to all whom it may concern that I the undersigned claim 10 thousand miners inches of the water flowing in this creek or any part of 10 thousand miners inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek on the southerly side or to cross the creek with pipe or flume or both to any place on the property known as the Ebner Mine or to carry across or further then the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner Dam about $1\frac{3}{4}$ miles up from Juneau-Alaska on Gold Creek.

“Dated this 20th day of June, 1910.

“Time 7:30 A. M.

“Locator—H. T. TRIPP.

“Witness:

“JOHN SOINI.”

V.

That at the time of making said water location it was also in contemplation of this plaintiff and its successors in interest to build a 200-stamp mill at the lower end of its property on the left bank of Gold

Creek going up said creek, on the Cape Horn Lode Mining Claim, and to convey the water from a point [50] on Gold Creek at or near where said notice was posted to said new mill and to such other points on Gold Creek as were necessary for the prosecution of the work of mining said property and milling the ores therefrom, and that in pursuance of said plan a survey was commenced on or about the last of July, 1910, of a flume-line from the point on Gold Creek at which said notice was posted to the millsite, a distance of about 4,000 feet; all of which was done prior to any pretended location of water of Gold Creek by the defendant. That said work of enlarging the facilities and increasing the capacity of the mill for the purpose of mining said property and treating the ores therefrom was, and has been, continuously kept up from the time of commencing the same to the present time, and up to the present time the said flume-line has been about completed, being built upon the left bank of Gold Creek going up said creek, and is a flume three feet by four feet and over 4,000 feet long, with a capacity to carry over ——— miner's inches of water, and the excavation for the foundation of said mill has been nearly completed and the timber frames for a 200-stamp mill shipped and now on the ground at Juneau, which includes timbers for the mill building, ore-bins and batteries; that part of the machinery for said mill has also been purchased and shipped and is on the ground at Juneau, as well as a 20-drill compressor plant, and a tunnel run from the proposed site of the new mill in and through said mining property

for a distance of 400 or 500 feet, which said tunnel is 8 feet by 8 feet, and is intended for the purpose of opening up the ore bodies to be milled and treated by said 200-stamp mill. That during all of said time and from the commencement of said work and down to the present time there has been kept employed on said property from 20 to 60 men constructing the flume and performing other necessary work for the completion of said undertaking. [51]

VI.

That while said work of plaintiff was progressing as aforesaid, the said defendant, by its officers, agents and representatives, attempted to wrongfully enter upon the said Lotta patented lode mining claim and the Parish No. 2 lode mining claim and take possession of a portion of said mining claims against the will and consent of this plaintiff, and in order to prevent said wrongful entry and trespass upon said mining claims by said defendant, its agents and representatives, this plaintiff commenced an action, being Cause No. 803-A of this court, and made application for a temporary restraining order, restraining the said defendant from trespassing upon the property of this defendant, and especially the Lotta patented claim and the Parish No. 2 mining claim; that upon the hearing thereof this Court refused said restraining order upon the grounds that there was a dispute as to the title to the property in controversy, and that the plaintiff could suffer no irreparable damages by reason of the acts complained of, and that plaintiff's remedy would be by an action in ejectment.

VII.

That thereafter and on or about the 28th day of September, 1910, while the work above mentioned was in progress, and while this plaintiff, by its representatives or agents, was in the actual possession of the said Lotta patented mining claim mentioned herein, and performing work thereon in the building of trails, etc., the said defendant by its officers, agents and employees, attempted to go upon the said Lotta patented claim and to construct and build a dam in Gold Creek on said claim and about the center of said claim, and they were requested and ordered to depart from said premises by the representatives of this plaintiff, and they did so depart and move away from said [52] premises, but again, and on, to wit, the 3d day of October, 1910, and while the said plaintiff and its agents and representatives were in the actual possession of said Lotta patented claim and also of the Parish No. 2 lode mining claim, and engaged in work upon said claims, again enter in and upon said Lotta and Parish No. 2 lode mining claims at a point near the boundary of said Lotta and Parish No. 2 mining claims, and undertook to build a dam across said creek and to divert the water therefrom, which undertaking was resisted by the representatives and agents of this plaintiff, and the said defendant company, through its agents, officers and representatives, thereupon caused the representatives and agents of this plaintiff who had been resisting the entry of said officers and agents of said defendant upon said Lotta and Parish No. 2 lode mining claims, to be arrested by the United States

Marshal on John Doe warrants, which were issued on John Doe complaints filed with the United States Commissioner, verified by an officer and representative of said defendant company, and while the agents and representatives of plaintiff were in the custody of the said United States Marshal, the said representatives, agents and employees of the said defendant company partially constructed their dam across Gold Creek sufficiently to make a pretended diversion of some water of Gold Creek into a short piece of timber flume, which had hastily been constructed by the employees of the said defendant company. That after said arrests were made and the work above resisted accomplished by the defendant company, the representatives and agents of this plaintiff returned to said Lotta and Parish No. 2 lode mining claims and proceeded with their said work, especially the running of a tunnel for the opening up of the Parish No. 2 mining claim at a point on the right hand of Gold Creek going up said creek at an altitude of about ——— feet above the bed of the creek on the hillside; that in running [53] said tunnel the debris and muck was dumped therefrom down said hillside into said Gold Creek, but all of such work and dumping was done upon said Parish No. 2 lode mining claim. That this plaintiff failing to obtain a restraining order as above set forth, the said defendant continued its said work of building and constructing a timber flume in and over the said Parish No. 2 lode mining claim, and when they reached a point in the construction of their said flume on the hillside on the right bank of said Gold Creek,

just below the mouth of the tunnel that was being run by this plaintiff as aforesaid, and where this plaintiff had been dumping, the said defendant did, by its officers and agents, again cause the representatives of this plaintiff, who were engaged in the work of running said tunnel and dumping as aforesaid, to be arrested in the same manner and form as the arrests first hereinbefore referred to, and while said representatives and agents of this plaintiff were in the custody of said United States Marshal, the said defendant connected up its said timber flume and thus crossed the said Parish No. 2 lode mining claim. That the entry of said defendant in and upon and over the ground and mining claims of this plaintiff was at all times resisted by this plaintiff and the same was a wrongful and forcible entry and against the will and consent of said plaintiff, and the only possession that said defendant ever gained of any part or portion of said Parish No. 2 or the Lotta patented claim was made in a forcible manner as herein described, and this action is brought to oust said defendant from such possession.

WHEREFORE, this plaintiff prays for the relief demanded in the amended complaint herein.

WINN & BURTON,
Attorneys for Plaintiff. [54]

United States of America,
District of Alaska,—ss.

I, William M. Ebner, being first duly sworn, on oath, say: That I am the president of the Ebner Gold Mining Company, plaintiff in the above-entitled ac-

tion; that I have read the foregoing reply and know the contents thereof, and believe the same to be true; that as such president I make this verification on behalf of said plaintiff company.

WM. M. EBNER.

Subscribed and sworn to before me this 3d day of June, A. D. 1911.

NEWARK L. BURTON,
Notary Public for Alaska.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Reply. Filed May 19, 1911. E. W. Pettit, Clerk. John R. Winn, Newark L. Burton, Attorneys for _____. Office: Juneau, Alaska. Office No. _____. [55]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendants.

**Order Granting Motion of Defendants to Make
Complaint More Definite.**

On this day this cause coming on for hearing upon the motion of defendant to make the complaint herein more definite and certain, the plaintiff being represented by J. R. Winn, Esquire, and the defendant being represented by William S. Bayless, Esquire, and J. A. Hellenthal, Esquire, after argument had, the Court, being fully advised in the premises, grants said motion, the plaintiff is allowed to amend by interlineation, and defendant is given until May 11, 1911, to answer.

Done in open Court this 3d day of May, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal H, page 85. [56]

In the District Court for the District of Alaska, Division No. 1.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order Allowing Complaint as Amended.

On this day, the plaintiff being represented by Messrs. Winn & Burton, and the defendant being rep-

resented by J. A. Hellenthal, Esquire, and William S. Bayless, Esquire, it is ordered that the complaint as amended be, and the same is hereby allowed, and defendants are given until to-morrow to plead.

Done in open court this 8th day of May, 1912.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal H, page 95. [57]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order [Re Waiver by Defendant of Defense of
Another Action, etc.].**

J. R. Winn, Esquire, appearing for plaintiff, and L. P. Shackelford, Esquire, and J. A. Hellenthal, Esquire, appearing for defendant, the defendants waive the defense of another action pending for the trial of this cause at this term of court and upon appeal, but the right to raise it at any subsequent trial is reserved.

Done in open court this 16th day of May, 1911.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal H, page 126. [58]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order Overruling Plaintiff's Demurrer.

This cause coming on regularly for hearing upon the demurrer of plaintiff to defendant's further answer to the second cause of action stated in the amended complaint herein, J. R. Winn, Esquire, appearing for the plaintiff, and L. P. Shackelford, Esquire, and J. A. Hellenthal, Esquire, appearing for the defendant, after argument by respective counsel and the Court being fully advised in the premises, said demurrer is overruled, to which ruling plaintiff excepts and the exception is allowed.

Done in open court this 16th day of May, 1911.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal H, page 128. [59]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant.

**Order [Dismissing Third Cause of Action of
Amended Complaint Without Prejudice].**

Upon motion made by counsel for plaintiff in the above-entitled cause, in open court, in the presence of counsel representing the above-named defendant in said above-entitled cause, that the third cause of action set forth in the amended complaint herein be dismissed without prejudice, for the reason that upon an examination of the records of title it had been ascertained that the title to the Cape Horn Lode Mining Claim set up and described in said third cause of action in said amended complaint was in William M. Ebner and not in the Ebner Gold Mining Company, the party plaintiff herein;

And the Court being fully advised in the premises, IT IS ORDERED that said third cause of action in said amended complaint herein be, and the same is hereby, dismissed without prejudice to the bringing or commencement of another suit for the same cause or subject matter of said action.

Done in open court this 24th day of May, A. D. 1911.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Min. Co., Defendant. Order. Filed May 24, 1911. E. W. Pettit, Clerk. By ———, Deputy. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ——. [60]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order Waiving Jury in Trial.

Now, on this day, J. R. Winn, Esquire, appearing for the plaintiff, and L. P. Shackelford, Esquire, and J. A. Hellenthal, Esquire, appearing for defendant, upon the consent of both parties hereto, in open court,

it is ordered that a jury be waived in the trial of this cause.

Done in open court this 15th day of May, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal H, page 120. [61]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

Case No. 835-A.

EBNER GOLD MINING CO., a Corporation,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Motion [to Insert Matter on Page 4 of Answer].

Comes now the defendant and makes application to the Court to insert the following on page 4 of the defendant's answer, immediately following paragraph 2 of the defendant's answer to the second cause of action:

"2d-b. And defendant further alleges as a further defense to said second cause of action that if the plaintiff ever acquired any interest in premises and mining claims set forth in said second cause of action, neither the plaintiff nor any of his grantors or predecessors in interest did or performed or caused to be performed any work, labor or improvements of any kind and nature or description, upon or for the use and

benefit of said Parish No. 2 lode claim under or by virtue of said alleged location of plaintiff, and that plaintiff and his grantors wholly failed and neglected to represent said claim or resume work thereon until long after the water and mining locations of defendant as hereinafter set forth and have *fail* to record the affidavit of annual labor and improvements required by Statute, and thereby the plaintiff's claim, if any he had, became and was actually forfeited."

Dated this 9th day of June, 1911.

HELLENTHAL & HELLENTHAL,
SHACKLEFORD & BAYLESS,

Attorneys for Defendant. [62]

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Motion. Filed June 9, 1911. E. W. Pettit, Clerk. J. A. Hellenthal, Attorney for Defendant. Office: Juneau, Alaska. [63]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

Case No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order [Allowing Insertion of Matter on Page 4 of Answer].

This matter coming on on application of the defendant, the Court being fully advised, **HEREBY ORDER** that the following be inserted in the answer of the defendant herein on page 4, immediately following paragraph 2 of the defendant's answer to the second cause of action:

“2d-b. And defendant further alleges as a further defense to said second cause of action that if the plaintiff ever acquired any interest in premises and mining claims set forth in said second cause of action, neither the plaintiff nor any of his grantors or predecessors in interest did or performed or caused to be performed any work, labor or improvements of any kind and nature or description, upon or for the use and benefit of said Parish No. 2 lode claim under or by virtue of said alleged locations of plaintiff, and that plaintiff and his grantors wholly failed and neglected to represent said claim or resume work thereon until long after the water and mining locations of defendant as hereinafter set forth and have failed to record the affidavit of annual labor and improvements required by Statute and thereby the plaintiff's claim, if any he had, became and was actually forfeited.”

Done in open court this 9th day of June, 1911.

EDWARD E. CUSHMAN,

Judge.

To the foregoing order plaintiff excepts and its exception is allowed.

EDWARD E. CUSHMAN,
Judge. [64]

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Order. Filed June 9, 1911. E. W. Pettit, Clerk. J. A. Hellen-thal, Attorney for Defendant. Office: Juneau, Alaska. [65]

[Order Denying Findings.]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Defendant.

This matter coming on upon the defendant's request for Findings and the Court being fully advised, denies the findings requested by the defendant other than those given in the findings already filed.

Done in open court this 5th day of July, 1911.

EDWARD E. CUSHMAN,
Judge.

To the foregoing order defendant excepts, which exception is allowed.

EDWARD E. CUSHMAN,
Judge.

Entered in Court Journal No. 11, page 271, Fairbanks, Alaska.

[Endorsed]: 1659. 835-A. Order Denying Findings (Deft's.). Filed in the District Court, Territory of Alaska, 4th Div. Jul. 5, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. [66]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Findings of Fact and Conclusions of Law.

This cause having heretofore come on for hearing upon the issues made by the amended complaint, the amended and supplemental answer and the reply to said amended and supplemental answer, a jury having been by the respective parties expressly waived, plaintiff having introduced all of its testimony and

rested its case, and the defendant having introduced all of its testimony and rested its case; plaintiff having introduced its rebuttal testimony and defendant having introduced its sur-rebuttal testimony, both parties having rested and argument of counsel representing the respective parties having been made, and the Court being fully advised in the premises, finds:

1. That the plaintiff, Ebner Gold Mining Company, is a corporation organized December 5, 1895, and existing under and by virtue of the laws of the United States provided for the District of Alaska; and is authorized to do and has been engaged in and doing a general mining business in said district for over fifteen years. Said plaintiff corporation is entitled to hold, deal in and acquire title from the United States to mineral lands and been qualified so to do at all times mentioned in the amended complaint herein. [67]

2. That the defendant is a corporation duly organized and doing business in the District of Alaska.

3. The Court further finds that the plaintiff is now and has been for several years last past seized in fee and possessed and entitled to the possession of that certain patented lode mining claim situated in the Harris Mining District, District of Alaska, namely, the Lotta lode mining claim, United States Mineral Survey No. 87, more particularly described as follows, to wit:

Beginning at Corner No. 1 Lotta lode claim (patented), a post at the NW. centre end of claim; thence north $57^{\circ} 24'$ east 150 feet to

Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. 3, identical with Corner No. 5 Taku Gold and Silver lode claim, Survey No. 88, patented, and Corner No. 1 Royal Lode Survey No. 238, patented; thence south $57^{\circ} 24'$ west 150 feet to southeast centre end of Lotta Lode, 300 feet to Corner No. 5, identical with Corner No. 5, Royal Lode, Survey No. 238, patented; thence east side doorway of old cabin, bears north $5^{\circ} 7'$ east 96.2 feet distance; thence north $31^{\circ} 36'$ west 1500 feet to Corner No. 6; thence north $57^{\circ} 24'$ East 150 feet to NW. centre end and place of beginning. Mag. Var. of all courses from a true meridian 32° east of north.

4. That while plaintiff was the owner of such mining claim and seized and possessed thereof, the defendant, early in August, 1910, without right or title, entered into possession of part of said Lotta mining claim and without right or title thereafter constructed thereon a portion of a certain dam, with structures accessory thereto, for the purpose of diverting the waters of Gold Creek flowing in, through and over said Lotta lode mining claim, and ousted and ejected plaintiff therefrom, and now wrongfully and unlawfully withholds the possession thereof from the plaintiff.

5. That the plaintiff is not and never has been seized, possessed or entitled to the possession of that certain tract of ground described in paragraph 3 of the plaintiff's second cause of action, set forth in the amended complaint herein, and known and referred to as the Parrish #2 lode mining claim. That the

ground claimed by the plaintiff as the Parrish #2 lode mining claim was located solely for purposes of convenience; that no [68] discovery of mineral-bearing rock in place, of any value, was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in its development or in the expectation of finding ore.

6. The Court further finds that no assessment work required by law to the extent of \$100 each year has been performed or caused to be performed in labor and improvements of any kind or for the benefit and use of said Parrish #2 claim prior to the year 1909, and that the plaintiff and its grantors failed and neglected to sufficiently represent said claim during the years prior to 1909, after its attempted location in 1899.

The Court further finds that the annual assessment work and labor required by law has been done and performed upon the Parrish #2 lode mining claim for the years 1909 and 1910 and within the time in each of said years required by law, providing the same was a valid and subsisting mining claim, based upon a valid location.

7. The Court further finds that about the first day of August, 1910, while the waters of Gold Creek were flowing in their usual channel L. D. Mulligan, acting as the agent and employee of the defendant, posted a notice upon the property in controversy, said notice reciting the location by him of 20,000 miner's inches of the unappropriated waters of Gold Creek.

That thereafter the defendant proceeded to erect part of a dam and construct a flume upon the public domain, which flume and a portion of said dam were on, over and across the property claimed by the plaintiff as the Parrish #2 lode mining claim, and that at the time of said location and erection of said dam and flume and the diversion and appropriation of said water, the said [69] property so described as the Parrish #2 lode mining claim was a part of the unoccupied, unsegregated public domain of the United States, and that said flume extends across the said property indicated upon the map on file herein, known as Defendant's Exhibit #7, which for the purposes of description is made a part of this finding.

8. The Court finds that under the custom of miners which was and is generally observed by the miners of the Harris and surrounding mining districts, the Harris Mining district being the mining district in which all the property and property rights in controversy are situated, the appropriator of water has uniformly exercised the claimed right, without opposition, to build ditches and canals across unpatented mining claims owned and held by persons other than the appropriator, in order to convey water to the place of intended use, whether such water is diverted from the stream on the mining claim or such other or beyond the same.

9. The Court further finds that under the custom of miners, recognized by the miners of the district within which the property in controversy is situated, the riparian proprietor has no right to the use of

the water of the running streams by reason of such riparian ownership as against a prior appropriator, and the Court further finds that under the customs of miners observed by the miners of the district in which the property in dispute is situated, rights to the use of the waters of running streams may be acquired by diversion, appropriation and application to beneficial use. That the defendant went upon the property in controversy to construct a dam and flume for the purpose of diverting and appropriating water for use in furnishing power in connection with the operation of a stamp-mill to be constructed by it and for other uses in connection with [70] the operation of its mines in Silver Bow Basin, within the district drained by said Gold Creek.

10. The Court further finds that the Oregon mining claim referred to in defendant's answer as located by J. P. Corbus and the Oregon mining claim as located by R. G. Datson were each made solely for the purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the defendant or its grantors, or at all, on either of said claims, nor any indication or evidence of such as would warrant or justify one in spending time, work or money in the development of either of such claims or with the expectation of finding ore.

11. The Court further finds that the Canyon mining claim is based upon a discovery within the boundary of the Lotta patented mining claim above described, and that said location is void and without effect.

And the Court concludes as a matter of law :

1. That the plaintiff is entitled to the possession of the Lotta mining claim and is the owner thereof as staked upon the ground and described in plaintiff's amended complaint, and is entitled to a decree ousting the defendant therefrom.

2. That the plaintiff is entitled to a writ of restitution and a writ of ejectment herein restoring the plaintiff to the possession of the Lotta patented claim, as more particularly set out in the Findings of Fact herein, said writ of ejectment to eject the defendant, its officers, agents and employees from said premises and each and every portion thereof.

3. That the location known as the Parrish #2 lode mining claim is void and of no effect. [71]

4. That the locations known as the Oregon lode mining claim, located by R. G. Datson, and the Oregon lode mining claim, located by J. P. Corbus, and the Canyon lode mining claim, located by W. R. Lindsey, are void and of no effect.

5. The Court further concludes that neither of the parties is entitled to recover costs in this suit.

Done in open court this 5th day of July, 1911, *nunc pro tunc* as of June 12, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered in Court Journal No. 11, page 268, Fairbanks, Alaska.

[Endorsed]: 1659. 835-A. Findings of Fact and Conclusions of Law. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 5, 1911. C. C.

Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. [72]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Defendant.

Judgment and Decree.

This matter having come on for trial, plaintiff being represented by Messrs. Winn & Burton, the defendant by Messrs. Hellenthal & Hellenthal and Messrs. Shackleford & Bayless; evidence having been already taken, arguments heard and the cause submitted, and the Court having made its Findings of Fact and Conclusions of Law, and being fully advised in the premises:

It is ORDERED, ADJUDGED, CONSIDERED AND DECREED that the plaintiff have and recover of and from the defendant the possession of that certain lode mining claim known as the Lotta mining claim, United States Survey No. 87, and that the defendant be ejected from the possession of said mining claim, or so much of the same as it is in possession of,

which said lode mining claim is particularly described as staked upon the ground and more particularly as follows, to wit:

Beginning at Corner No. 1 Lotta lode claim (patented), a post at the NW. centre end of claim; thence north $57^{\circ} 24'$ east 150 feet to Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. 3, identical with Corner No. 5 Taku Gold & Silver lode claim, Survey No. 88, patented, and Corner No. 1 Royal lode, Survey No. 238, patented; thence south $57^{\circ} 24'$ west 150 feet to southeast centre end of Lotta lode, 300 feet to Corner No. 5, identical with Corner No. 5 Royal lode, Survey No. 238, patented; whence east side doorway of old cabin bears north $5^{\circ} 7'$ east 96.2 feet distance; thence north $31^{\circ} 36'$ west 1500 feet to Corner No. 6; thence north $57^{\circ} 24'$ east 150 feet to NW. centre end and place of beginning. Mag. Var. of all courses from a true meridian 32° east of north. [73]

It is further CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing further by his complaint herein, and except as to the Lotta lode mining claim this cause and action be dismissed, without cost to either side.

The Court further retains and reserves jurisdiction in this cause for the purpose of supplementing, if the same hereafter appear necessary, this judgment with a fuller and more accurate description of the property referred to therein, and for the further purpose to determine to what exact extent the struc-

tures of the defendant are within the limits of the said Lotta Lode mining claim therein referred to.

Done in open court this 5th day of July, 1911, *nunc pro tunc* as of June 12, 1911.

EDWARD E. CUSHMAN,

Judge.

Entered in Court Journal No. 11, page 270, Fairbanks, Alaska.

[Endorsed]: 1659. 835-A. Judgment and Decree. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 5, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. [74]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order [Re Transfer of Files, from First to Fourth Division; Re Settlement of Findings, Entry of Judgment, Filing of Bill of Exceptions, etc.].

It being orally stipulated by counsel that the files in this cause may be transferred from the First to the Fourth Division, that the Court may there settle the findings and make and enter judgment and rule upon

the findings requested by either side; the papers to be then returned to the Clerk's office of the First Division for the final entry of judgment; that each side be allowed thirty (30) days from the return of the findings and judgment to the office of the Clerk of the court in the First Division, within which to prepare and file their written exceptions to such findings, judgment and decree; the Clerk to notify the attorneys of record on each side of the date of filing such findings, judgment and decree. That each side be allowed six (6) months from the date of the filing of the judgment in which to prepare, serve and file proposed bill of exceptions, if appeal or writ of error is desired to be sued out by either of such parties.

Upon such stipulation it is so ordered by the Court.

Done in open court this 12th day of June, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal H, page 188. [75]

*In the District Court for the Territory of Alaska,
Fourth Division.*

835-A.

EBNER GOLD MINING COMPANY,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation et al.,
Defendant.

**Order [Directing Return of Papers from Fourth to
First Division].**

Now on this day, it appearing to the Court that the

papers in this cause have heretofore been transferred from the Clerk's office of the First Division of the Territory of Alaska, to this court and now are in the possession of the Clerk of this court;

And it further appearing that the Honorable EDWARD E. CUSHMAN has filed his findings and judgment in said cause and other orders in connection therewith, and that there is no longer need of retaining said papers in this court;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Clerk of this court retransfer all papers received by him from the Clerk of the District Court, Territory of Alaska, First Division, as well as the findings, judgment, and all papers in connection therewith.

Done in open court at Fairbanks, Alaska, this 10th day of July, 1911.

EDWARD E. CUSHMAN,
District Judge.

Entered in Court Journal No. 11, page 283, Fairbanks, Alaska.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court, Fourth Division, Territory of Alaska, do hereby certify, that the above and foregoing is a full, true and correct copy, and the whole thereof, of the original Order in Cause 835-A, entitled: Ebner Gold Mining Company, a Corporation, Plaintiff, vs. Alaska-Juneau [76] Gold Mining Company, a Corporation et al., Defendant, as the same appears of record in my office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of said Court, at Fairbanks, Alaska, this 24th day of July, 1911.

[Seal] C. C. PAGE,
Clerk of the District Court, Territory of Alaska,
Fourth Division.

By GEO. F. GATES,
Deputy.

[Endorsed]: Form No. 680. No. 835-A. In the District Court of the United States for the District of Alaska, 4th Div. Ebner Gold Mining Co., a Corporation, vs. Alaska-Juneau Gold Mining Co., a Corporation et al. Certified Copy Order Retraversing All Papers to Clerk of Court, for First Division. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. [77]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order Allowing Plaintiff Until February 12, 1912,
to File Bill of Exceptions].**

The motion for plaintiff herein asking for sixty

days' additional time to that already granted herein for the purpose of preparing, serving and filing a bill of exceptions on appeal herein, coming on for hearing and the attorneys representing the respective parties being present, and after presentation of said motion and the Court being fully advised in the premises, **HEREBY GRANTS AND ALLOWS** the plaintiff sixty days' time after the 12th day of Dec., 1911, in which to prepare, serve and file its Bill of Exceptions herein.

Done in open court this 18 day of October, A. D. 1911.

T. R. LYONS,
Judge.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Company, Defendant. Order. Filed Oct. 18, 1911. E. W. Pettit, Clerk. By _____, Deputy. John R. Winn, Newark L. Burton, Attorneys for _____. Office: Juneau, Alaska, Office No. _____. [78]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
tion,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation.

**[Order Extending Time to May 12, 1912, to File Bill
of Exceptions.]**

This matter coming on for hearing on the motion and application of the above-named plaintiff for an extension of time in which to prepare, serve and file a bill of exceptions herein, and the plaintiff being represented by Messrs. Winn & Burton, and the defendant being represented by Messrs. Hellenthal & Hellenthal; after hearing read the affidavits filed herein and arguments of counsel, and the Court being fully advised;

It is hereby ORDERED, and the Court does hereby extend, the time in which to prepare and serve and file a bill of exceptions herein for the period of ninety days, commencing with the 12th day of February, 1912, or until May 12, 1912.

Done in open court this 10th day of February, 1912.

THOMAS R. LYONS,
Judge.

Entered Court Journal I, page 145. [79]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation.

Order [Extending Time to June 12, 1912, to File Bill of Exceptions].

On application of the Ebner Gold Mining Company, the plaintiff in the above-entitled cause, said plaintiff is given thirty days, commencing on and after the twelfth day of May, 1912, in which to present to the Court for allowing, signing and certifying a bill of exceptions herein; that is, the time is extended for said purpose until June 12, 1912.

Done in open court this 1st day of May, A. D. 1912.

THOMAS R. LYONS,

Judge.

Entered Court Journal No. I, page 277.

[Endorsed]: Filed May 1, 1912. E. W. Pettit,
Clerk. By _____, Deputy. [80]

*In the District Court for the District of Alaska,
Divison No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order Extending Time to June 30, 1912, to File Bill of Exceptions.

THIS MATTER coming on for hearing on motion of plaintiff in open court for the extension of the

time in which to file, present and have settled herein a bill of exceptions, and the parties being represented by their respective counsel, and the Court being fully advised in the premises, hereby extends the time of the presentation, settlement and allowance of a bill of exceptions herein until and including June 30th, A. D. 1912.

Done in open court this 25th day of May, A. D. 1912.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By _____, Deputy. [81]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Motion and Request for Original Exhibits to be
Forwarded to Appellate Court.**

Comes now the above-named plaintiff, by its attorneys, Winn & Burton, and moves the Court for an

order making certain original exhibits part of the bill of exceptions herein, and that such original exhibits be attached to said bill of exceptions and such said original exhibits be forwarded to the Appellate Court, upon the following ground and for the following reason, viz.:

That such original exhibits would be difficult to duplicate and it would be impracticable to obtain copies of the same.

That such original exhibits desired by the plaintiff to be attached to said bill of exceptions and forwarded to the Appellate Court, are as follows:

“N”—Map of Ebner patented mining claims, also showing Parrish No. 2;

“M”—Photo showing tunnels;

“PP”—Photo;

“QQ”—Photo;

“3”—(Defendant’s Ex. 3)—Blue print showing Ebner Company’s mining claims;

“9”—Photo showing rock (so-called boulder);

“21”—Photo;

“66”—Plat of geological sketch map of upper part Gold Creek;

“68”—Photo;

“69”—Photo;

“70”—Photo, open cut.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 23, 1912. Ed. M. Lakin, Clerk. By ———, Deputy. [82]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order [Sustaining Objections of Defendant to
Certificate to Bill of Exceptions, etc.].**

This matter coming on for hearing on motion of Ebner Gold Mining Company, the plaintiff herein, by Winn & Burton, its attorneys, to make certain exhibits herein a part of the record on appeal, which said exhibits are set forth and described in the motion served herein on Hellenthal & Hellenthal, attorneys for defendant, on May 11, 1912, also on motion of said plaintiff for the settling, signing and allowing Bill of Exceptions herein, which said Bill of Exceptions was then and there presented to the Court under the certificate of Isaac Hamburger, official court stenographer, dated May 15, 1912; and the said defendant's objections to said motion and the said defendant's objections to the form of certificate requested by plaintiff to be signed by the Judge certifying to said tendered and offered bill of exceptions, in that said bill of exceptions did not contain a full transcript of all the testimony and evidence, and the Court after hearing counsel for the respective parties

sustains the said objections of the defendant and refuses to sign and certify said certificate to said bill of exceptions, for the reason that said bill of exceptions does not contain a transcript of all the testimony and evidence in said cause. To which ruling of the Court the plaintiff asks and is allowed an exception. [83]

Done in open court this 23d day of May, A. D. 1912.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By ———, Deputy. [84]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Affidavit of John R. Winn [Filed May 25, 1912].

United States,

District of Alaska,—ss.

John R. Winn, being first duly sworn, on oath deposes and says: That I am one of the attorneys for the

above-named plaintiff and have resided in the town of Juneau, Alaska, for more than ten years last past, and that I am well acquainted with mining properties in Silver Bow Basin, near Juneau, Alaska, and am well acquainted with the Parrish No. 2 lode mining claim, the subject matter of litigation set forth in the second cause of action in the amended complaint herein, and have been acquainted with said lode claim for several years prior to the time of commencement of this action, and said lode mining claim is now and at all times mentioned herein has been and was at the time of the commencement of this action and at the time of the trial of said cause and the rendition of judgment herein, worth more than the sum of Five Hundred (\$500.00) Dollars.

JNO. R. WINN.

Subscribed and sworn to before me this 25th day of May, 1912.

R. J. BORYER,

Notary Public for the District of Alaska.

To the admission of which defendant objects for the reason that [85] the same is incompetent to prove any fact. Objection overruled and Exception allowed defendant.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By ———, Deputy. [86]

In the District Court for the District of Alaska, Division No. 1.

CASE NO. 835-A.

THE EBNER GOLD MINING COMPANY,
Plaintiff,

vs.

THE ALASKA-JUNEAU GOLD MINING COMPANY,
PANY,

Defendant.

**Objections to Signing and Certifying to Bill of
Exceptions.**

Comes now the defendant and objects to the form of the certificate which plaintiff asks the Court to make to the proposed Bill of Exceptions, for the following reasons:

I.

The Court is asked to certify that the proposed is a full, true and correct bill of exceptions; in so far as it in any way affects, appertains or refers to the Parrish No. 2, Canyon and Oregon lode mining claims and the custom of miners with reference to the appropriation and acquisition of water and water right, and the crossing over mining claims and real estate owned by others, for the purpose of conveying such water to the place of use or contemplated use, where in truth and in fact it contains but a portion of the evidence which bears upon the ownership, right of occupation and *locus* of said Parrish No. 2, Canyon and Oregon lode claims and the custom of miners with reference to the appropriation and

acquisition of water and water right and the right of crossing mining claims of others with ditches and flumes, where it is necessary to do so in order to convey water so appropriated to the place of use or intended use, and on that account is not a true nor a full transcript of the evidence in this regard. It is only true as far as it goes. The affidavit of the Court Reporter who reported said cause, which is attached hereto and made a part hereof, shows that the proposed bill of exceptions is only a part of the evidence adduced at the trial of said cause, and that a full transcript would be about one-third longer, and would consist of about 1500 pages, typewritten. The [87] certificate should be that other and further evidence was introduced, and should not contain the statement that the proposed bill of exception is a full, true and correct bill, for the same is wholly untrue.

II.

Further objection is made to the certificate wherein the Court is asked to certify that the bill of exception as proposed contains all the evidence pertaining to the Parrish No. 2, Canyon and the Oregon mining claims, for the reason that the location, as located on the ground, of the Parrish No. 2 and the Oregon and the validity of the Canyon mining claim depends on the location of the Lotta as the said Lotta is located on the ground, none of which evidence is included in said proposed bill of exception, nor are the exhibits offered to show the *locus* of said Lotta, included or sought to be annexed to said proposed bill of exception.

III.

Further objection is made to that part of the certificate in which it is stated that said bill of exception contains all of the exhibits, for the reason that the exhibits sought to be annexed by the plaintiff are but a small portion of the exhibits introduced at the trial of said cause and the certificate in so far as said statement goes is wholly untrue.

IV.

Further objection is made for the reason that all the evidence introduced and exhibits offered bears and bear more or less upon the questions raised and tends to prove and establish the facts found and conclusions reached. While no doubt the Court Reporter intended to correctly certify upon the question, he was merely mistaken and misjudged the effect of the evidence and the questions in dispute, nor should this matter in anywise be based upon the judgment of the Court Reporter. It is for counsel to point out and for the Court to determine that the effect of the evidence is such as to place the Lotta patented mining [88] claim at a certain place upon the ground and what the evidence establishes and what evidence is material to establish a certain fact. It is neither fair to the Court nor to this defendant to present these questions on appeal without presenting to the other Court a full and complete transcript of all the evidence offered and exhibits introduced at the trial below upon which the findings and conclusions were based by the lower court. The Court is now asked to certify that a portion of the evidence considered at the trial by the Court in

reaching its findings and conclusions is all of the evidence that was considered. This would put the Court in an attitude of having made findings and having arrived at conclusions without evidence to support such findings and conclusions, when in fact the same were amply supported by evidence. Obviously this would be unfair, both to the Court and to this defendant. The certificate should state that the foregoing proceedings were had at the trial, but that they cover only a portion of the material proceedings had and evidence offered. And that the bill of exceptions as proposed is correct in so far as it goes, but that it is incomplete. Secondly, it may be further urged that the Court should not be asked that this small portion of the evidence offered as set up in the proposed bill of exceptions contains all the evidence that bears upon certain points or questions of fact. This is unfair unless the Court is furnished with and goes over a full transcript of the evidence heard at the trial. Neither Court nor counsel can be expected to remember for a year all of the evidence produced at the trial; especially is this true in this case as much evidence was offered. Yet the Court could not make the annexed certificate unless it so remembered. To rely upon the judgment of the Reporter in regard to what evidence is pertinent or not would simply be substituting the judgment of the Reporter for that of the Court. In this case, however, as we have shown, all the evidence offered at the trial below bears to some extent upon the matters sought to be reviewed, and no bill of exception would be complete unless it contained all the

evidence offered at the trial. [89]

SHACKLEFORD & BAYLESS,
HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

*In the District Court for the District of Alaska,
Division No. 1.*

CASE NO. 835-A.

THE EBNER GOLD MINING COMPANY,
Plaintiff,

vs.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY,
Defendant.

Affidavit of Isaac Hamburger [Filed June 3, 1912].

United States of America,
District of Alaska,—ss.

I, Isaac Hamburger, being first duly sworn according to law, depose and say that I was the official Court Reporter at the trial in which the Ebner Gold Mining Company was plaintiff and the Alaska-Juneau Gold Mining Company was defendant, No. 835-A, of the records on file of said court, at Juneau; that from the best of my recollection, not having my notes with me to which I can refer, a full transcript of such record will cover about 1500 pages and may reach as high as 1600 pages; that from two-thirds to three-fourths of the evidence taken at the trial of said cause has been reduced to typewriting and is now incorporated in the Bill of Exceptions as proposed by the plaintiff.

ISAAC HAMBURGER.

Subscribed and sworn to before me the undersigned this 23d day of May, 1912, at Cordova, Alaska.

[Seal]

ED. M. LAKIN,

Clerk of the District Court, for the Territory of Alaska, Third Division. [90]

[Endorsed]: No. 835-A. In the District Court for the District of Alaska, Division No. 1. The Ebner Gold Mining Co., Plaintiff, vs. The Alaska-Juneau Gold Mining Co., Defendant. Objections to Signing Bill of Exceptions. Filed Jun. 3, 1912. E. W. Pettit, Clerk. By _____, Deputy. [91]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order [Making All Original Exhibits a Part of Bill of Exceptions and Directing Transmission of Same to Appellate Court].

This matter coming on in open court on motion of the above-named plaintiff, by its attorneys, Winn & Burton, and said defendant being present by its attorneys, Hellenthal & Hellenthal, which said motion was in the way of a request to make certain exhibits a part of the Bill of Exceptions herein and to for-

ward certain of said exhibits with said Bill of Exceptions to the clerk of the Circuit Court of Appeals of the Ninth Circuit, and the Court being fully advised in the premises,

IT IS ORDERED that all original exhibits on file herein are made a part of the bill of exceptions to be signed, allowed and settled herein by the Court, and that the said originals be forwarded with said bill of exceptions to the Clerk of the Circuit Court of Appeals of the Ninth Circuit E. E. C. at San Francisco, California, including the following, to wit:

Defendant's Exhibit #50.

U. S. C. & G. S. Gastineau Channel, S. E. Alaska
marked "KK."

Defendant's Exhibit #11.

" " 6.

" " 7.

" " 2.

" " 12.

Notice of Location Water Right, Mulligan 8. [92]
Transcript Commissioner's Court, Juneau, in case U.
S. v. Angus Mackey et al.

62, Deed from J. P. Corbus to Alaska-Juneau Gold
Mining Co. conveying Oregon lode.

Warrant, Information and Complaint in case U. S.
v. Angus Mackey et al., Commissioner's Court,
Juneau.

Warrant in case U. S. vs. F. J. Wettrick, Commis-
sioner's Court, Juneau.

Warrant in case U. S. vs. Al Graham et al.

51, Proof of Labor, Idaho, Colorado, Oregon, Wyom-
ing, Nevada and Maryland lodes.

(S) Complaint, case U. S. vs. Al Graham et al., Commissioner's Court, Juneau.

Complaint, case U. S. vs. F. J. Wettrick, Commissioner's Court, Juneau.

Deed from W. R. Lindsay to Alaska-Juneau Gold Mining Company, Canyon lode.

#27, Field-notes, Colorado lode.

Certified copy by U. S. Surveyor-General May 24, 1911, map of Dora, Dora 2d, Dora 3d, St. Paul, Bluff, Humboldt, Webster Millsite, Ropeway, Etta, Forrest Lotta, Taku Gold and Silver, Keystone, Crown Point, and Golden Fleece lodes.

Plaintiff's Exhibit "B."

52, Proof of Labor, Idaho, Colorado, Oregon, Wyoming, Nevada and Maryland lodes.

Location Notice, Takou Gold and Silver lode dated Dec. 7, 1880 (certified copy).

53, Proof of Labor, Summit No. 1, Summit No. 2, Summit No. 3, Summit No. 4, Colorado, Oregon, Wyoming, Nevada and Maryland lodes.

54, Proof of Labor, Idaho, Colorado, Oregon, Wyoming, Nevada and Maryland lodes.

18, Deed from Mulligan to Alaska-Juneau Gold Mining Company conveying water right on Gold Creek.

Defendant's Exhibit 29. [93]

Defendant's Exhibit 28.

Defendant's Exhibit 30.

35, Certified copy Location of Water by Mulligan.

65, Certified copy Location Notice Lotta Lode.

59, Sketch Map of Gold Creek Bulletin No. 287 Pl. XV U. S.

Geological Survey.

Defendant's Exhibit 4.

61, Certified copy Minutes of Miners' Meeting February 18, 1882, Harris Mining District.

"II," Map showing property of Alaska-Juneau Gold Mining Company with proposed improvements.

25, Certified copy Notice of Location Canyon Lode.

B, U. S. Patent (Certified copy), Samuel Coulter, for Lotta, Takou Gold and Silver, Keystone, Crown Point, Golden Fleece, Grand Review and Jewel lode Mining claims.

Plaintiff's Exhibit "AA" and

Plaintiff's Exhibit "BB."

Plaintiff's Exhibit "EE."

Defendant's 41.

W (Photograph).

U " "

Plaintiff's Exhibit "FF."

Ex. 12 (Photograph).

Plaintiff's Exhibit "HH."

Plaintiff's Exhibit "GG."

"J" (Photograph).

"K" " "

"L" " "

"I" " "

71 " "

Plaintiff's Exhibit "H."

"V" (Photograph). [94]

67, Bulletin No. 287, Pl. XIX U. S. Geological Survey showing Rock slide Last Chance Basin.

22 (Photograph).

19 " "

Defendant's Exhibit 16.

20 (Photograph).

23 “

10 “

24 “

“NN” Bulletin No. 287, Pl. X U. S. Geological Survey showing Ebner Stamp-mill, etc.

13 (Photograph).

Defendant's Exhibit 15.

Defendant's Exhibit 14.

“ “ 26.

Plaintiff's Exhibit “N.”

Defendant's Exhibit 3.

Plaintiff's Exhibit “PP.”

“ “ “M.”

“ “ “QQ.”

9 (Photograph).

21 “

66, Bulletin No. 287, P. IX U. S. G. S. Geological Sketch Map of Upper part of Gold Creek.

68 (Photograph).

69 “

70 “

Deed from Alaska-Juneau Gold Mining Co. to Ebner Gold Mining Co., conveying conflict between Parrish No. 1 and Colorado lodes.

Resolution authorizing the President and Secretary of Alaska-Juneau Gold Mining Company to execute deed for above conflict to said Ebner Gold Mining Company.

Contract of Alaska-Juneau Gold Mining Company agreeing to convey [95] to the Ebner Gold

Mining Company conflict between Parrish lode claim and Colorado lode.

Also the following papers, etc., are made a part of the record and bill of exceptions herein, to wit:

Motion for New Trial.

Findings of Fact and Conclusions of Law offered by the plaintiff.

Objections to proposed Findings of Fact and Conclusions of Law offered and tendered by the defendant.

Objections and Exceptions to Findings and Conclusions made by the Court.

Exceptions to refusal of the Court to make certain Findings and Conclusions offered by the plaintiff and to modification of same by the Court.

Location Notice, Parrish No. 2 lode claim.

Deed of said Parrish No. 2 lode claim from William Ebner to Ebner Gold Mining Company.

Contract, Deed and Resolution in re conflict Parrish No. 1 with Colorado lode claim.

Answer and oral opinion in Cause No. 803-A.

Copy of page 99 of the ledger of Ebner Gold Mining Company.

Done in open court this 25th day of May, 1912.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By _____, Deputy. [96]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Assignment of Errors.

Comes now the above-named plaintiff, Ebner Gold Mining Company, and assigns the following errors committed by the Court on the trial and determination of the above-entitled cause and upon the rendition of a judgment herein dismissing plaintiff's cause of action No. 2 set forth in amended complaint herein pertaining to the Parrish No. 2 lode mining claim, and upon which plaintiff relies in the Appellate Court, to wit:

I.

The Court erred in overruling and denying plaintiff's motion to strike from defendant's answer all those portions of the same and each and every part thereof moved against in the motion of plaintiff filed herein on May 15, 1911.

II.

The Court erred in overruling plaintiff's demurrer to the defendant's further answer to the second cause of action stated in the amended complaint, and also plaintiff's demurrer to defendant's answer

to the third cause of action stated in the amended complaint; which said demurrer is filed herein on May 16, 1911.

III.

The Court erred in allowing the defendant herein after [97] the trial of said cause to amend its answer herein by pleading a noncompliance of plaintiff in performing the annual assessment work upon the Parrish No. 2 lode mining claim, and pleading a forfeiture thereof; which said amendment was filed on June 9th, 1911.

IV.

The Court erred in permitting the defendant upon the trial of said cause, over the objections of the plaintiff, to introduce evidence with reference to the appropriation and acquisition of water and water rights and the conveying of such water by flume, pipe, or ditch line across mining claims and real estate of others and conveying such water to the place of use or intended use of such appropriator. The introduction of such evidence and testimony to establish any such custom among miners of South-eastern Alaska, and in Harris Mining District, was all admitted over the objections and exceptions of the plaintiff.

V.

The Court erred in not making, signing and filing the following findings of fact and conclusions of law offered and tendered by the plaintiff herein respecting Parrish No. 2 lode mining claim, to wit:

Finding No. 4 offered and tendered by plaintiff

herein, which said finding is substantially as follows:

“That the plaintiff is now and has been for several years last past, seized, possessed and entitled to the possession and the owner by discovery, location, staking and marking of the boundaries and recording by its grantors and predecessors in interest and by a full compliance with the laws of the United States and doing and performing of the annual assessment work each and every year of the Parrish No. 2 lode mining claim, etc.”

And in not making and signing and filing Finding No. 5, offered and tendered by plaintiff, which requested the Court to [98] find:

“That while plaintiff was so seized and possessed and entitled to the possession of the Parrish No. 2 lode mining claim, the defendant some time in the month of August, 1910, and before the commencement of this action, without right or title, entered into possession of part of Parrish No. 2 lode mining claim and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.”

And in not making, signing and filing Finding No. 6, offered and tendered by the plaintiff herein, which is substantially as follows:

“The Court further finds that at the time of the commencement of this action and for several years prior thereto the plaintiff was the owner and entitled to the possession of said Parrish No. 2 lode mining claim as against the defendant and all persons and corporations whomsoever, and all of the

service ground thereof."

"The court also erred in not making the Findings of Fact tendered and requested by plaintiff which are as follows:

(a) "The Court further finds that the annual assessment work and labor required by law has been done and performed upon the Parrish No. 2 lode mining claim for the years 1907, 1908, 1909 and 1910 and within the time in each of said years required by law."

(b) "The Court further finds that the annual assessment work required by law has been done and performed upon the Parrish No. 2 lode mining claim for the years of 1908, 1909 and 1910."

(c) "The Court further finds that the annual assessment work and labor has been done and performed upon the Parrish No. 2 lode mining claim each and every year since its location in the year of 1899." [99]

VI.

The Court erred in not making, signing and filing Conclusions of Law No. 1 and 2 offered and tendered by plaintiff, which in substance requested the Court to conclude that the plaintiff was entitled to a writ of ejectment ejecting said defendant from Parrish No. 2 lode mining claim, and granting a restraining order against the defendant restraining it from anywise interfering with plaintiff's possession of Parrish No. 2 lode mining claim.

VII.

The Court erred in making and rendering its Finding No. 5, which is as follows:

“That the plaintiff is not and never has been seised, possessed or entitled to the possession of that certain tract of ground described in paragraph III of the plaintiff’s second cause of action, set forth in the amended complaint herein and known and referred to as Parrish No. 2 lode mining claim. That the ground claimed by the plaintiff as Parrish No. 2 lode mining claim was located solely for purposes of convenience; that no discovery of mineral-bearing rock in place of any value was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in its development or in the expectation of finding ore.”

Also in making Finding No. 6, wherein the Court finds in substance that plaintiff did not, prior to the year 1909, perform the necessary assessment work on Parrish No. 2 lode mining claim.

The Court also erred in making all that part of Finding No. 7 in which it finds that the defendant proceeded to erect a part of a dam on the public domain and that at said time the property described in Parrish No. 2 lode mining claim was a part of [100] the unoccupied and unsegregated public domain of the United States. All of which said findings were against law and without any evidence to support the same, and in many respects against all of the evidence in said cause and against the admitted facts by both plaintiff and defendant in the pleadings and upon the trial and hearing of said cause.

VIII.

The Court further erred in making the following findings: Finding No. 8, in which the Court finds in substance that under the custom of miners of Harris Mining District, being the District in which Parrish No. 2 lode mining claim is located, that appropriators of water had uniformly the right to build ditches, etc., across unpatented mining claims owned and held by other persons, etc., and also Finding No. 9, in which the Court finds substantially that under the custom of miners the riparian proprietor has no right to the use of water of running streams by reason of such riparian ownership, as against a prior appropriator, and that the defendant went upon Parrish No. 2 lode mining claim to construct a dam, etc., for the purpose of diverting and appropriating the water to be used in running of a stamp-mill, etc.; for the reason that each and all of said findings are against law, unsupported by the evidence, and against the great preponderance of evidence and against the uncontradicted facts in the case.

IX.

The Court erred in making his Conclusion No. 3, which reads as follows:

“That the location known as Parrish No. 2 lode mining claim is void and of no effect.”

Said conclusion is without any evidence to support the same. The Court further erred in making Conclusion No. 5, which reads as follows:

“The Court further concludes that neither of

the parties is entitled to recover costs in this suit.” [101]

—for the reason that said conclusion is unsupported by the evidence and against law—the Court having granted affirmative relief to the plaintiff and adjudged it to be the owner of the Lotta lode mining claim set forth and described in the first cause of action in the amended complaint, and by reason of this the plaintiff was entitled to recover its costs in said action.

X.

The Court erred in that part of the judgment and decree in said cause wherein it adjudged and decreed as follows:

“It is further considered, ordered, adjudged and decreed that the plaintiff take nothing further by his complaint herein and except as to the Lotta lode mining claim, this cause and action be dismissed without costs to either side.”

XI.

The Court erred in overruling the motion of plaintiff for new trial herein.

XII.

The Court erred in not signing, settling and allowing the bill of exceptions presented for said purpose on the 23d day of May, 1912.

WINN & BURTON,

Atty. for Plaintiff in Error.

Service of the foregoing assignment of errors admitted this 25 day of May, 1912.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By ———, Deputy. [102]

*In the District Court for the District of Alaska,
Division No. 1.*

Case No. 835-A.

EBNER GOLD MINING COMPANY,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
Defendant.

Petition for Writ of Error and Allowance Thereof.

To the Honorable E. E. CUSHMAN, Judge of the
District Court for the District of Alaska:

Now comes the above-named Ebner Gold Mining Company, a corporation, plaintiff, by its attorneys, Winn & Burton, and complains that in the record and proceedings had in said cause and also in the rendition of the judgment in the above-entitled cause in the District Court for the District of Alaska, Division No. 1, against the said plaintiff on the 5th day of July, 1911, wherein said Court ordered said cause dismissed as to Parrish No. 2 lode claim, manifest error hath happened to great damage of said plaintiff, as will more fully appear from the assignments of error filed herewith.

Wherefore the defendant prays for the allowance

of a Writ of Error and for an order fixing the amount of bond in said cause, and for such other orders and process as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this —— day of May, A. D. 1912.

WINN and BURTON,
Attorneys for Plaintiff.

The above petition for Writ of Error is allowed and the bond fixed at Two Hundred and Fifty Dollars (\$250.00). To be approved by the Clerk of the above-entitled Court.

EDWARD E. CUSHMAN,
Judge. [103]

Service by copy admitted this 25 day of May, 1912.

HELLENTHAL & HELLENTHAL,
Atty. for Def.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By ——, Deputy. [104]

*In the District Court for the District of Alaska,
Division No. 1.*

CASE NO. 835-A.

EBNER GOLD MINING COMPANY,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
Defendant.

Bond on Writ of Error.

No all men by these presents: That Ebner Gold Mining Company, corporation, principal, and R. P. Nelson, as surety, are held and firmly bound unto Alaska-Juneau Gold Mining Company, a corporation, the above-named defendant, its successors in office, or assigns, in the full sum of Two Hundred and Fifty Dollars (\$250.00), for which payment well and truly to be made we bind ourselves and each of ourselves, our heirs, representatives, administrators, executors, successors in office, and assigns firmly by these presents.

Sealed with our seals and dated this 7th day of June, A. D. 1912.

The condition of the above obligation is such, that whereas the above-named Ebner Gold Mining Company, the above-named plaintiff, has sued out a Writ of Error, to the United States Circuit Court of Appeals for the 9th Circuit, to reverse the judgment in the above-entitled cause by the District Court for the District of Alaska, Division No. 1, in so far as such judgment effects the title of the said plaintiff in and to the Parrish No. 2 lode claim.

Now, therefore, the condition of this obligation is such, that if the above-named Ebner Gold Mining Company a corporation, plaintiff, shall prosecute its Writ of Error to effect and answer all damages and costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full

force and virtue. [105]

EBNER GOLD MINING COMPANY,

Principal.

By JNO. R. WINN,

Atty.

R. P. NELSON,

Surety.

United States of America,

District of Alaska,—ss.

R. P. NELSON

Being first duly sworn, on oath deposes and says: I am a resident and householder of the District of Alaska and am not an Attorney or Counsellor at Law, Marshal, Deputy Marshal, Commissioner, Clerk of any court, or other officer of other courts, and am worth a sum of \$500.00 over and above all my just debts and liabilities, and exclusive of property exempt from execution.

R. P. NELSON.

Subscribed and sworn to before me this 7th day of June, 1912.

[Seal]

JNO. R. WINN,

Notary Public for Alaska.

The above and foregoing Bond is hereby approved as to form and sureties this 8th day of June, 1912, in accordance with order of Court made May 25, 1912, at Cordova, and filed May 28, 1912, at Juneau, Alaska.

[Court Seal]

E. W. PETTIT,

Clerk of District Court, Dist. of Alaska, Division
No. 1.

[Endorsed]: 835-A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Co., a Corp. vs. Alaska-Juneau Gold Mg. Co., a Corp. Bond on Writ of Error. Filed Jun. 8, 1912. E. W. Pettit, Clerk. By ———, Deputy. [106]

Filed in the District Court, Territory of Alaska, Third Division. May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Hon. E. E. CUSHMAN, Judge of the Dis-
trict Court for the District of Alaska, Greeting:

Because in the record and proceedings as also in
the rendition of the judgment of a plea which is in
said District Court, Division No. 1 thereof, before
you, between Ebner Gold Mining Company, a corpo-
ration, plaintiff, and Alaska-Juneau Gold Mining
Company, a corporation, defendant, a manifest error
hath happened, to the great prejudice and damage of

the said plaintiff as set forth and appears by the petition herein.

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at the said place and said Circuit on or before thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done. [107]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of May, A. D. 1912.

Attest my hand and the seal of the District Court for the District of Alaska, Division No. 1, at the Clerk's office at Juneau on the day and year last above written.

[Seal]

E. W. PETTIT,
Clerk of the District Court for the District of Alaska,
Division No. 1.

Allowed this 25th day of May, A. D. 1912.

EDWARD E. CUSHMAN,
Judge.

Due service of the within writ of error acknowledged this 25th day of May, A. D. 1912.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant. [108]

Filed May 28, 1912. E. W. Pettit, Clerk. By
———, Deputy. [109]

Filed in the District Court, Territory of Alaska,
Third Division. May 25, 1912. Ed. M. Lakin,
Clerk. By K. L. Monohan, Deputy.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Citation on Writ of Error.

The President of the United States to Alaska-
Juneau Gold Mining Company, a Corporation,
and the Above-named Defendant, Greeting:

You are hereby cited and admonished to be and ap-
pear at the United States Circuit Court of Appeals
for the Ninth Circuit, to be holden at the city of San
Francisco, in the State of California, within thirty
days from the date of this citation, pursuant to a writ
of error filed in the Clerk's office of the District Court

for the District of Alaska, Division No. 1, wherein Ebner Gold Mining Company is plaintiff and plaintiff in error, and you, the said Alaska-Juneau Gold Mining Company, defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 25th day of May, A. D. 1912, and of the Independence of the United States the 136th.

EDWARD E. CUSHMAN,

Judge.

Due and personal service of the foregoing citation is hereby admitted on behalf of Alaska-Juneau Gold Mining Company, defendant in error, this 25 day of May, 1912.

HELLENTHAL & HELLENTHAL,

Attorneys for said Defendant in Error. [110]

Filed May 28, 1912. E. W. Pettit, Clerk. By

———, Deputy. [111]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order Extending Time Until June 24, 1912, to File
Record on Appeal.**

This matter coming on for hearing on motion in open court and the respective parties being represented by their counsel, and the motion of plaintiff to extend the time of thirty days mentioned in the citation in which to file with the Clerk of the Circuit Court of Appeals the record herein to a period of sixty days, is allowed. That is, the plaintiff in error is given until the 24th day of July, 1912, for the purpose above indicated, and the defendant in error is given until said time to appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Done in open court this 25th day of May, A. D.
1912.

EDWARD E. CUSHMAN,
Judge.

To the allowance of which the defendant excepts, for the reason that it is beyond the power of this court to extend the time beyond July 5th, 1912, said date

being a year after the signing of the judgment herein.

Objection overruled and exception allowed defendant.

EDWARD E. CUSHMAN,
Judge.

Filed in the District Court, Territory of Alaska,
Third Division. May 25, 1912. Ed. M. Lakin,
Clerk. By K. L. Monohan, Deputy. [112]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Objections to Proposed Findings of Fact and Con-
clusions of Law Offered and Tendered by De-
fendant.**

I.

Comes now the above-named plaintiff by its attor-
neys, Winn & Burton, and objects to Finding of Fact
No. 4, offered and tendered by the said defendant, for
the reason that the same is against the law and evi-
dence offered upon said trial and is not supported by
the evidence, and is against and not within the scope
of the oral decision rendered by the Court in said
cause, in that the said oral decision so made and ren-

dered by the Court in reference to the said Parish No. 2 lode claim only holds, and the Court only stated, that said location was invalid on the ground that the land claimed within the exterior boundary lines of said Parish No. 2 lode mining claim was not mineral ground, and that there was no sufficient discovery of valuable mineral by the locator to warrant a location of said claim as a mineral claim; and further, the Court did not state in its oral opinion that the plaintiff and its grantors had failed to do the assessment work on said Parish No. 2 lode claim.

II.

Said plaintiff also objects to Findings Nos. 5, 6, 7 so offered and tendered by defendant, for the reason and upon the ground that there is no evidence to support the same, and that the said oral decision rendered by the Court did not refer to the matters therein stated, and said findings are immaterial and redundant, and not within the scope of the matters being litigated; [113] that the Court did not attempt to pass upon the respective rights of the plaintiff and defendant to any water of Gold Creek, nor did the Court attempt to pass upon the question as to whether or not there were any miners' rules, regulations or customs in force which had any bearing upon the question or questions or property that was being litigated, and that said findings are unnecessary, for the reason that said Parish No. 2 lode claim was only found to be invalid by reason of the facts set forth in the foregoing objection set out in preceding paragraph.

III.

The plaintiff specially objects to the tendered Finding No. 8 of the defendant, wherein the defendant attempts to have the Court state that it made an inspection of the property in litigation but only examined the discovery of the plaintiff and made no attempt to examine the discovery made upon the Oregon lode claim located by Corbus, when, as a matter of fact, there is no evidence to support such finding whatsoever, and it will be presumed that the Court in visiting the property in litigation made an examination of all the objects upon the ground and place and places upon the ground that would throw any light whatever upon the matter being investigated and matters in dispute.

IV.

Plaintiff also objects to the finding which defendant offered following Finding No. 8 offered by said defendant, which is unnumbered, and especially that part of said finding so offered that reads as follows: "The Court further finds that the Oregon Mining Claim referred to in the defendant's answer as located by J. P. Corbus and the Oregon Mining Claim as located by R. G. Datson were made for the purpose of convenience," for the reason that the Court in its oral decision found that said locations so made by Corbus and Datson were made without any discovery, and especially without a discovery of mineral-bearing rock in place, and that there was no proof that said ground was mineral ground. This plaintiff does not object to that part of said finding wherein the Court [114] is requested by defendant to find

“that the Canyon mining claim is based upon a discovery within the boundaries of the Lotta patented mining claim within described and is void and without effect.”

I.

And this plaintiff objects to Conclusions of Law numbered 2 and 4, for the reason that said conclusions of law are not supported by the findings of fact and conclusions of law, and the same are not supported by any evidence or facts in the case.

II.

And the plaintiff also objects to each and all of the findings of fact which defendant offered to the Court and included on *their* answer in this cause, and to each and all and every of said so offered and tendered findings, upon the ground and for the same reasons urged in objections numbered I, II, III, and IV as set forth herein.

WINN & BURTON,
Attorneys for Plaintiff.

Due service of a copy of the within objections is admitted this 15 day of June, 1911.

SHACKLEFORD & BAYLESS,
Attorneys for ———.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Objections. Filed Jun. 15, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ——. [115]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 15, 1912. Ed. M. Lakin, Clerk.

*In the District Court for the District of Alaska,
First Division, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Bill of Exceptions and Transcript of Evidence.

Be it remembered, that the above-entitled cause came on duly and regularly to be heard on Tuesday, the 23d day of May, 1911, before the Honorable EDWARD E. CUSHMAN, Judge of the District Court for the District of Alaska and assigned to the Third Division, trying said cause by agreement of counsel:

The plaintiff being represented by its attorneys and counsel, Messrs. WINN & BURTON.

The defendant being represented by its attorneys and counsel, Messrs. SHACKLEFORD & BAYLESS and Messrs. HELLENTHAL & HELLENTHAL.

Opening statements were made to the Court by Mr. Winn in behalf of the plaintiff and by Mr. Shackelford in behalf of the defendant.

Whereupon the following proceedings were had:
[117]

[Testimony of William M. Ebner, for Plaintiff.]

WILLIAM M. EBNER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Your name is William M. Ebner?

A. Yes, sir.

Q. Where do you reside now?

A. I reside in Hollywood, California.

Q. How long since you took up your residence in that place? A. About eight months.

Q. Prior to that time, where did you reside, Mr. Ebner? A. Juneau, Alaska.

Q. How long did you reside in Juneau, Alaska?

A. Ever since 1890.

Q. Up until about eight months ago?

A. Up until about eight months ago—that was our home,—Juneau was our home.

Q. What, over this period of time that you were in Alaska, were you engaged in? A. Mining.

Judge WINN.—We have some record evidence now. We will offer in evidence a certified copy of the Articles of Incorporation of the Ebner Gold Mining Company.

Mr. SHACKLEFORD.—We object to the introduction of the articles offered for the reason that it appears that the same are executed on the 3d of December, 1895, at a time when there was no act au-

(Testimony of William M. Ebner.)

thorizing the incorporation of companies in the District of Alaska; and for the further reason that the articles purport to have been organized under the laws of the State of Oregon and were not filed with the officers with whom such articles were required to be filed under the [118] laws of the State of Oregon, nor with any officers in the District of Alaska that corresponded with the officials designated in the incorporation act of the State of Oregon in force and effect at that time.

By the COURT.—You expect to follow this up with evidence that this company has done business as a corporation since the time—

Judge WINN.—Ever since its organization down to the present time and is still doing business.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted and the exception was by the Court allowed.

Mr. SHACKLEFORD.—We further object to the articles on the ground that the same purport to have been executed under the laws of the State of Oregon and that the company has not qualified within the District of Alaska as a foreign corporation, nor as a domestic corporation.

By the COURT.—That does not affirmatively appear—the objection will be overruled. To which ruling counsel for defendant is allowed an exception.

The articles are admitted in evidence and marked Plaintiff's Exhibit "A."

Mr. SHACKLEFORD.—We further object to the articles for the reason that they appear to have been

(Testimony of William M. Ebner.)

filed only with the Surveyor-General or *ex officio* Secretary of the District of Alaska.

Judge WINN.—We will prove that they were recorded in the Commissioner's office down here which corresponds with the recorder's office—we will prove that by Mr. Winn, the commissioner. [119]

Judge WINN.—We now offer in evidence a certified copy of the survey, of the plat under which all of the property that now belongs and is owned by the Ebner Gold Mining Company, all the patented property, is included and we expect to follow that up by mesne conveyances from the parties down to the Ebner Company, which includes the Lotta; they were conveyed right straight down from the original owner to the company.

Mr. SHACKLEFORD.—We object to the introduction of this plat for the reason that the matter has gone to patent and all the proceedings in the Land Department, whatever they may be, have merged in the patent; the patentee is bound by the notes as given in the patent regardless of what the notes may have been on this plat.

By the COURT.—You are offering this now as a chart to be used for the purpose of illustration in connection with the testimony or are you offering it as independent evidence?

Judge WINN.—We are offering it for both purposes. The patent was granted on this survey, and we also offer it in illustrating the testimony, in tying up the Parish claim, etc.

By the COURT.—It will be admitted. Is it certi-

(Testimony of William M. Ebner.)

fied in such shape as to show it was the plat on which the patents were admitted?

Judge WINN.—Yes, sir; if it is not certified to we will make it show that that is the survey on which the patent was granted.

Mr. HELLENTHAL.—I guess there is no question about that. We except to its admission only in so far as it is proposed to be used to modify or explain or in any wise vary or contradict the terms of the patent itself. [120]

Exception allowed. The plat is marked Plaintiff's Exhibit "B" and admitted in evidence.

Judge WINN.—I desire to withdraw Mr. Ebner for a moment and call Mr. Grover Winn.

[Testimony of Grover C. Winn, for Plaintiff.]

GROVER C. WINN, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your name? A. Grover C. Winn.

Q. What official position do you hold in the District of Alaska?

A. United States Commissioner, District of Juneau.

Q. How long have you been United States Commissioner? A. Since the third of August, 1910.

Q. You are also *ex officio* recorder? A. Yes, sir.

Q. Of this district? A. Yes, sir.

Q. You have in your custody and under your control the books and records of the Juneau Recording

(Testimony of Grover C. Winn.)

District? A. I have.

Q. I will ask you if this book which I exhibit to you, which is called Record #7, dated on the back December, 1889, to March, 1891, #7 Deeds and Mortgages—I will ask you if that is one of the books of record that belongs to your office. A. It is.

Q. I will ask you to turn to pages 143 to 147 in that book.

(Witness does so.)

Judge WINN.—We now offer in evidence the United States patent to Samuel Coulter for the mining claims set forth and described [121] in the map and plat which we have offered in evidence in this case. One among the claims, the Lotta, which is designated as U. S. Survey #87 and is the patent that was granted upon the survey as made as indicated in this exhibit “B” which we have offered in evidence.

Mr. HELLENTHAL.—No objection if you admit the whole patent; there is a plat attached to it?

Judge WINN.—There is a plat attached to it which is a counterpart of the plat offered in evidence. We offer in evidence the patent and also the plat attached to it and is part of the patent.

Admitted in evidence and marked Plaintiff’s Exhibit “C,” the understanding being that the commissioner will furnish a certified copy of the patent record, including the plat.

Q. Now, I will ask you if this record book is one of the books which forms part of the records of your office? A. It is.

(Testimony of Grover C. Winn.)

Judge WINN.—We offer in evidence now a deed commencing on page 483 of this book from Samuel Coulter and H. E. Coulter, his wife, of the City of Portland, Oregon, to the Taku Mining Co.—Taku Mining & Milling Co., a corporation. This is dated on the 20th day of August, 1889, and is a direct deed from the patentee of these claims in question and which is included in the patent.

By the COURT.—It includes all of them?

Judge WINN.—Yes, sir.

Mr. HELLENTHAL.—We object on the ground that the grantee has no capacity to hold property or take property.

By the COURT.—Do you propose to offer in evidence either the articles of incorporation of that company or show it was a [122] *de facto* company doing business for a number of years as a corporation in this vicinity?

Judge WINN.—The Taku Mining & Milling Co. is a corporation duly organized and existing under the laws of the State of Oregon. The deed on its face is affirmative evidence that they had a right to convey, etc.

Objection overruled. Defendant allowed an exception. It is understood that the instrument is to be copied into the record. It is attached hereto and made a part hereof.

Judge WINN.—We now offer in evidence a mortgage which is found in book 6 of the records, at page 485, which is a mortgage by the Taku Mining & Milling Co. to Samuel Coulter, dated August 20, 1889,

(Testimony of Grover C. Winn.)

and recorded in this book I have just mentioned, commencing at page 45 and including several pages. I will state that there was a mortgage recorded on this property and it was afterwards foreclosed and we have the marshal's deed.

Mr. SHACKLEFORD.—We object to the instrument for the reason that there is no evidence of the legal capacity of the Taku Mining & Milling Co. either to hold or give title.

Objection overruled and exception allowed defendant. The instrument is attached hereto and made a part hereof.

Q. Is this book 9 of Mortgages or Deeds?

A. 9 of Deeds and Mortgages.

Q. Is that one of the books or records of your office? A. It is.

Mr. WINN.—This mortgage was given by the Taku Mining & Milling Co. to Samuel Coulter and wife, and there is an assignment of the mortgage here by Coulter to Willis Thorp—we are offering in evidence the assignment, commencing at page 681 [123] and including 682.

Mr. SHACKLEFORD.—We object to the assignment on the ground that the mortgagor had no capacity. There is no evidence that the mortgagor had any capacity to hold title to property in the District of Alaska.

Objection overruled and defendant allowed an exception. The instrument is attached hereto and made a part hereof.

Q. This book of records #10 which we have here,

(Testimony of Grover C. Winn.)

I will ask you if that is one of the books of the records of your office. A. It is.

Judge WINN.—We now offer in evidence the marshal's deed from Lewis L. Williams, U. S. Marshal for the District of Alaska, to Willis Thorp, dated the 16th day of November, 1895, and found on pages 786, 787, 788 and 789 of this book. I suppose the marshal's certificate should be merged into this and should contain a full recital of all the foreclosure proceedings.

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial, no proper foundation having been laid for its introduction, and on the further ground that there is no proof of the legal capacity of the predecessor in interest the Taku Mining & Milling Co. to hold real estate in the District of Alaska.

Judge WINN.—To save any question about that, we will offer in evidence, and wish to have the stenographer copy, the complaint, etc., in the suit for foreclosure of mortgage being Case #393 of this court and the judgment and decree of foreclosure—we will change that. We offer in evidence in Case 393, in this court, the judgment and decree of foreclosure and order of sale made on June 7, 1895, *wherein* [124] *was* the purchaser of the property in question * * * and we will also offer in connection with this judgment the complaint of foreclosure in the case.

Mr. SHACKLEFORD.—We object to the judgment and decree as incompetent, irrelevant and im-

(Testimony of Grover C. Winn.)

material; no proper foundation having been laid for its introduction.

By the COURT.—Do you care to prove your service? Do you think the decree proves the service?

Judge WINN.—It recites service and it also appears that the party appeared and demurred and the demurrer was overruled and denied.

Objection overruled. Defendant allowed an exception.

The above papers are attached hereto (copies) and made a part hereof.

The originals are marked temporarily Plaintiff's Exhibit "D," to be returned to the clerk's files when copied.

Judge WINN.—Exhibit "D" covers the judgment and decree. We will now offer the amended and supplemental complaint in the same cause.

Same objection—same ruling. Defendant allowed an exception.

It is marked Plaintiff's Exhibit "E," to be withdrawn and copy attached hereto.

Judge WINN.—We now offer in evidence the order of sale which said order is stamped, Done in open court at Juneau, Alaska, this 7th day of June, 1895, Warren Truett, Judge of the District Court for the District of Alaska, and was filed on July 15, 1895. I think our statute makes the order confirming a sale proof of regularity in all proceedings pertaining to it.

Mr. SHACKLEFORD.—We object to the order of sale as being incompetent, [125] irrelevant and immaterial and no proper foundation having been

(Testimony of Grover C. Winn.)

laid, and on the further ground that there appears to be no reservation of jurisdiction in the decree of June 7th, and the order appears to have been filed July 15, 1895, after the Court lost jurisdiction unless reserved in the decree.

Objection overruled. Defendant allowed an exception.

It is marked Plaintiff's Exhibit "F," with understanding to be withdrawn when copied and attached hereto.

Judge WINN.—We now offer in evidence order confirming sale in the case of Willis Thorp, Pltff. vs. Taku Mining & Milling Co. et al., Case #393, of this court, which is dated on the 12th day of September, 1895, and signed by Warren Truett, Judge of the U. S. District Court for the District of Alaska.

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial and no proper foundation having been laid for its introduction, and on the further ground that it is apparently based on a sale made under the order of sale filed July 15, 1895, objection to which has already been made.

Objection overruled. Defendant allowed an exception.

Order is marked Plaintiff's Exhibit "G," to be withdrawn and copy substituted and attached hereto.

Judge WINN.—We now offer in evidence the marshal's deed, which is found in the book which we have just identified, the book of records #10, and found at pages 786, 787, 788 and 789 and dated on November 18, 1895.

(Testimony of Grover C. Winn.)

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial and no proper foundation having been laid to show jurisdiction or authority for the sale. [126]

Objection overruled. Defendant allowed an exception.

(Copy of the deed is to be attached hereto and made a part hereof.)

Judge WINN.—We now offer in evidence an instrument in writing purporting to be a deed dated November 18, 1895, from Willis Thorp and Sarah Thorp, husband and wife, of the town of Juneau, to William M. Ebner, which deed is found in the book 10 at pages 790 and 791 of the record, which deed purports to convey the property in question to Wm. M. Ebner.

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial and carrying title to a corporation, the Taku Mining & Milling Co., concerning which there is no proof as to its authority to take or hold property in the District of Alaska.

Objection overruled. Defendant allowed an exception.

(Deed to be copied into the record.)

Judge WINN.—We now offer in evidence an instrument in writing which purports to be a deed dated the 18th day of November, 1895, from Wm. Ebner and his wife to Charles W. Young of Juneau, Alaska, and purports to convey to Young a 1/16 interest in and to this property; it is found in the book

(Testimony of Grover C. Winn.)

of records #10 of this recording district, at pages 795 and 796.

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial. Objection overruled and defendant allowed an exception.

(The deed is ordered copied into the record—it is attached hereto and made a part hereof.)

Judge WINN.—We now offer in evidence a deed bearing date the 8th day of November, 1895, from Wm. M. Ebner and his wife to B. M. Behrends purporting to convey a 1/8 interest in and to this property we have been speaking of, all the mining [127] claims, and found in book 10 at pages 797 and 798.

Same objection. Objection overruled. Defendant allowed an exception.

(Same order as to copying the deed into the record.)

Q. We have a book here called Records 11 of deeds. I will ask you if that is a book of record of your office? A. It is.

Judge WINN.—We now offer in evidence a deed found at page 54 of this book just mentioned to the witness, dated the 9th day of December, 1895, by and between Wm. M. Ebner and wife of Juneau, Alaska, parties of the first part, and the Ebner Golding Mining Co., a corporation, the party of the second part.

Mr. HELLENTHAL.—We object to that for the reason that the Ebner Gold Mining Co. purports to be incorporated under the laws of the District of Alaska, at a time when it could not be incorporated and hence could have no legal existence and no capac-

(Testimony of Grover C. Winn.)

ity to hold or take property.

Objection overruled. Defendant allowed an exception.

(Same order as to copying the deed into the record.)

Judge WINN.—In this same book, commencing at page 57, we offer a paper purporting to be a deed dated April, 1895, from Chas. W. Young to the Ebner Gold Mining Co., purporting to be a deed to the property in question.

Same objection. Overruled. Defendant allowed an exception.

(Same order as to copying the deed into the record.)

Judge WINN.—In this same book, commencing at page 60, we offer an instrument bearing date the 9th day of December, 1895, wherein B. M. Behrends and his wife purport to convey all their interest in and to the property in question to [128] the Ebner Gold Mining Co.

Same objection. Objection overruled. Defendant allowed an exception.

Judge WINN.—We offer in evidence the Articles of Incorporation of the Ebner Gold Mining Co., which is found in this book which we have just identified by Grover Winn, the book of records #11, at pages 25 and 26 of these records.

Mr. HELLENTHAL.—We object to this offer—in the first place because the purported incorporation was attempted to be incorporated under the laws of Alaska at a time when there were no laws in

(Testimony of Grover C. Winn.)

Alaska authorizing the incorporation of the company and the corporation so attempting to be incorporated could have no legal existence, either *de facto* or *de jure*; for the further reason that there is no law, and never has been a law, authorizing the filing or recording of articles of incorporation with the United States Commissioner, and the United States Commissioner had no authority under the statute to record such articles and the same is incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

(Same order as to attaching the instrument and making the copy a part of this record.)

Q. I will ask you if this book which I present to you, which is called Book 15 of Lodes, is one of the records of your office. A. It is.

Judge WINN.—We now offer in evidence, subject to the further testimony of Mr. Ebner, the location notice of Parish #2 lode mining claim, commencing at page 157 and continuing on pages 158 and 9 and signed Wm. M. Ebner. We will question Mr. Ebner later concerning the making of the notice and [129] posting it. I will identify it at this time and offer it in evidence later on.

By the COURT.—You simply identify it by offering it by the page of the record?

Judge WINN.—Yes, sir.

Mr. SHACKLEFORD.—We now give notice to counsel on the other side that we demand the production of the original location notice of Parish #2.

(Testimony of Grover C. Winn.)

Judge WINN.—If we have it, we will bring it to you. We desire also at this time to identify the deed from Ebner for the Parish #2 lode mining claim to the Ebner Gold Mining Co.

Q. I will ask you if this book of deeds #20 is also one of the books of record of your office.

A. It is.

Judge WINN.—We now offer in evidence deed commencing on page 10 of this book #20 of Wm. M. Ebner. This covers some other property. We offer it in evidence for the purpose of showing the conveyance of the Parish #2, the deed, so far as the other property is concerned, is immaterial but we identify it at this time. I offer the whole of it, for the sole purpose of showing the conveyance of the Parish #2 to the Ebner Gold Mng. Co.

Mr. HELLENTHAL.—We object to it for the reason that the Ebner Gold Mining Co. has not been shown qualified to take and hold property; on the contrary, the evidence so far offered shows that the Ebner Gold Mng. Co. was a corporation attempted to be incorporated at the time that there was no law authorizing the incorporation in this district and therefore had no capacity to take or hold property.
[130]

By the COURT.—It will be admitted with the understanding that unless the existence of the Parish #2 is shown by sufficient location, it will be stricken out later. The other ground of the objection is overruled.

To which ruling of the Court counsel for de-

fendant then and there duly excepted. Exception allowed.

Witness excused.

**[Testimony of William M. Ebner, for Plaintiff
(Recalled).]**

WILLIAM M. EBNER—Continuation of direct examination.

(By Judge WINN.)

Q. How many years' residence did you state that you had had in Alaska prior to leaving here to go to California?

A. About twenty years; something like that.

Q. I have forgotten whether I asked you what business you followed during that period of time in Alaska or not. A. Yes.

Q. What was it? A. Mining.

Q. I have offered in evidence in this case Articles of Incorporation of the Ebner Gold Mining Company, which is marked Plaintiff's Exhibit "A." There seems to be a William M. Ebner who signed those articles. Are you the William M. Ebner that is mentioned in there? A. Yes, sir.

Q. I have also offered in evidence in this case Plaintiff's Exhibit "B," which is a series of mining claims commencing with the Lotta on the southerly end of the map and then extending through a series of mining claims. I will ask you to look at this map and plat, look at the names of the mining claims of there, and ask you if you are familiar with [131] that property? A. Yes, sir, I am.

(Testimony of William M. Ebner.)

Q. When, Mr. Ebner, did you first become acquainted with this mining property?

A. I first became acquainted with this mining property in 1891.

Q. 1891? Yes, sir.

Q. Was that before the Ebner Gold Mining Company became the owner of it? A. Yes, sir.

Q. Did you have anything to do with the running, mining or operating of this property prior to the time that the Ebner Gold Mining Co. became the owner of it? A. Yes, sir.

Q. How many years were you in any wise connected with this property before the Ebner Gold Mining Co. became the owner of it?

A. Why, about one year before, or one season before they came in possession of it.

Q. And that was in 1894; that is, the conveyance was made in 1895 to the Ebner Gold Mining Company? A. Yes, sir.

Q. What connection did you have with that property in 1894?

A. I leased the property and operated the mill, crushed some ore that I mined on the other side of the creek, from another property.

Q. What improvements, leaving out those late improvements that have been placed on the property within the last year, what improvements were there on this property when you first became acquainted with it and at the time you leased it and operated it?

[132]

A. There was a ten-stamp mill, a rock-crusher,

(Testimony of William M. Ebner.)

four Frue vanners, water-wheels and a tramway, cars, blacksmith-shop, etc.

Q. Do I understand you to say that you leased this mill and the milling property to mine this particular property that was afterwards the Ebner Gold Mining Company in 1895, or did you mine some other property that year that you leased it?

A. I leased the property, the entire property, in the winter-time or late in the fall, and during the fall of 1894 I crushed some rock from another property, and during the summer of 1895 I operated under a lease what was afterwards, what is now, the Ebner mine; or, in other words, these properties that are shown on this map.

Q. Did you continue for any length of time after the year 1895 to operate this property as a mining property?

A. Yes, sir, we continued to operate this as mining property until the spring of 1907.

Q. 1907? A. Yes, sir.

Q. Did you increase the capacity of the mill by adding any stamps, or did you make any other improvements while you were running this property for the Ebner Gold Mining Company other than was on there when the Ebner Gold Mining Co. became the owner?

A. Yes, sir, we added five stamps and we started a new mill, or, in other words, a compressor—we installed a compressor and we made a great many other improvements in the way of developing the property in the way of buildings; we built a new black-

(Testimony of William M. Ebner.)

smith-shop and several other buildings, such as assay buildings, etc., and we drove a great many tunnels; in fact, we drove most all the tunnels with the exception [133] of one or two that were driven there. All the long tunnels, the developed tunnels, were all driven by the Ebner Gold Mining Company.

Q. Can you state to the Court which one of those mining claims that is delineated on this exhibit "B" that the mill you have just spoken of is located and which one the air-compressor is located on?

A. Yes, sir; the air-compressor is located on the Lotta and the mill is located on the Taku Gold & Silver.

Q. Is either the mill or the air-compressor indicated on this map or plat, Exhibit "B," which you have in your hand?

A. The old mill is indicated on this.

Q. The air-compressor, as I understand it, was built afterwards, after the survey was made.

A. Yes, the air-compressor—it was built a long time after.

Q. You have given the Court the name of the claims the air-compressor is on? A. Yes, sir.

Q. That is the same mill that is up there now?

A. Yes, sir; that is the same mill that is up there now, it contains the stamps.

Q. And is that the same mill that was there before the Ebner Gold Mining Co. became the owner of it?

A. Yes, sir; the same mill.

Q. Except you increased its capacity?

A. Yes, sir, five stamps.

(Testimony of William M. Ebner.)

Q. It is a fifteen-stamp mill? A. Yes, sir.

Q. What water did you use in generating the power, running the mill, for milling the ore, and the compressor, etc., over [134] this period of time that you have just testified concerning?

A. We used the water from Gold Creek, taking it at the Ebner dam, about 1100 feet from the mill,—no, I think about a thousand feet from the mill.

By the COURT.—The mill you are talking about now, is that the one on the creek in the bottom of the gulch?

A. No; that is the old mill with the long wheel-house coming down from above the falls.

Q. About what period of time of each year, that is, how many months out of each year covering the period of time you have stated, from 1895 down to 1907, did you operate the mill and run the mines and develop them, etc., what period of time was your active work going on in this respect?

A. During the years of 1896 and 1897 we operated from early spring until late in the fall; commencing with 1898, I think from that time on, we pretended and did operate almost the entire year, with probably very short shut-downs.

Q. Did you do any development work outside of taking ore, extracting from the mines the necessary ore to mill?

A. Did we do any development work in the mine?

Q. Yes. A. Yes.

Q. Briefly, what did that consist of during those years?

(Testimony of William M. Ebner.)

A. The first years we drove what we call our second level; we started a cross-cut in the winter of 1895 and 1896 after the Ebner Gold Mining Company was incorporated, that is, on the upper level; that is driven in 176 feet, and the stopes and tunnels on the ledge, I think they aggregate between five and six hundred feet,—I wouldn't be positive exactly,—and two hundred feet lower down on the lower level, [135] coming into the top, on a level with the top of the old mill, that tunnel is in, I think, something like between five and six hundred feet, with connections through to the upper level.

Mr. SHACKLEFORD.—We move to strike the reference of the witness in the last answer to the incorporation of the Ebner Company as incompetent.

Motion denied. Defendant allowed an exception.

Q. From 1895 down to 1907, in what capacity were you serving this company and in what capacity were you running these properties and milling the ores?

A. I was the president of the company.

Mr. SHACKLEFORD.—Same objection as before, and we move to strike the answer of the witness as not the best evidence.

Objection overruled and motion denied; defendant allowed an exception.

The WITNESS.—(Continuing.) And I had charge of the works as manager.

Q. I will ask you if over this period of time you became acquainted with the monuments, the boundary lines, stakes, etc., of pretty much all this

(Testimony of William M. Ebner.)

patented property which is indicated on Plaintiff's Exhibit "B," which you hold in your hand?

A. Yes, sir, I did. I found them all and knew where they all were with the exception of a few—some were down in the creek that had gone out, and some that were on the hillside had gone away, but the majority of the monuments I found and was familiar with and am familiar with now,—in other words, I can go there and find them and know just where they are. [136]

Q. Now, I will ask you, Mr. Ebner, when you became familiar if at all, with the boundary lines, monuments, etc., upon the ground of what is known as the Lotta patented claim.

A. I became familiar with the boundary lines and some of the monuments of the Lotta in 1892.

Q. What particular corner posts or monuments of the Lotta claim in 1892 did you become acquainted with?

A. The northwest corner and the southwest corner.

Q. I will ask you, Mr. Ebner, that you mark those corners by the small letters "a" and "b" on this plat.

Mr. SHACKLEFORD.—They are numbered on the plat anyway.

The WITNESS.—This is the northwest corner (indicating) and this is the southwest corner (indicating). These two corners are numbered by posts. I think they are corner post #6 and corner post #5 as marked on this plat.

(Testimony of William M. Ebner.)

By The COURT.—P. No. 6 and P. No. 5?

A. Yes, sir.

Q. I have identified by Grover Winn, the Recorder and Commissioner of this Recording District, in Book 15 of the records, and also identified commencing with page 157 and continuing on pages 157 and 159, the location notice—I will let you take that book and look at this notice, and ask you if you know anything about that notice or one like it.

Mr. SHACKLEFORD.—Before you go into that I will ask, while your witness is on the stand, if he or you are able to comply with our demands for the production of the original notice.

Judge WINN.—I am going to ask him that in a moment.

Q. Do you know what became of the original notice, Mr. Ebner,—have you it in your possession?

A. I do not. [137]

Q. At whose instance was this instrument recorded. A. At mine.

Q. Do you know anything about a claim called the Parish No. 2 lode mining claim, Mr. Ebner?

A. Yes, sir.

Q. I will ask you if you had anything to do with the locating, staking out and marking the boundaries of the Parish #2 on the ground,—have anything to do with it individually, yourself?

A. Yes, sir.

Q. Now, this notice which is included in this book which you have just examined at pages 157, 158 and 159,—I will ask you if you ever posted any sort of

(Testimony of William M. Ebner.)

a notice of this kind upon the Parish No. 2 lode mining claim?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial, no proper foundation having been laid.

Objection overruled. Exception allowed defendant.

A. Yes, I did.

Q. Now, I will ask you, Mr. Ebner, how the notice which you posted upon the ground compared with the notice which has been shown you in this book, No. 15 of the records?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial, no proper proof having been made of the loss of the original notice.

By the COURT.—When did you last see the original notice?

A. Several years afterwards; the notice was put in a tin can and the tin can was tied to the stake,—I think about a year and a half afterwards, the last time I saw it; that was just before the snow-slide came down in there.

Q. It was posted on the claim?

A. Yes, sir. [138]

Judge WINN.—I will state to the Court that the statute also makes certified copies permissible in evidence in the absence of the original.

Objection overruled. Defendant allowed an exception.

Judge WINN.—We offer in evidence this location

(Testimony of William M. Ebner.)

notice found on pages 157, 158 and 159 of book 15 of Lodes.

Mr. SHACKLEFORD.—We object on the ground that no proper foundation has been laid for its introduction, and it is incompetent, irrelevant and immaterial, and no proper explanation has been given for the loss of the original notice posted on the ground, and for the failure to comply with the demands to produce the original notice recorded.

Q. (By the COURT.) Have you looked for the original notice recorded?

A. We have since I came here.

Mr. SHACKLEFORD.—And for the further reason that it appears from the said notice that it does not comply with the mining laws of the United States with reference to the location of lode mining claims, in that it fails to tie the location to any permanent or natural object by reference so as to identify the position of the claim.

(By the COURT.)

Q. Have you searched among your papers for the original of the recorded notice?

A. I did last fall, yes, sir, and I am inclined to think that it was lost in the office of Hill & Wettrick—that is where we had it last.

Q. You have been unable to find it?

A. Yes, sir, I have been unable to find it.

Q. Found no trace of it? A. No. [139]

Q. Have you searched among their papers?

A. I searched among my papers.

(Testimony of William M. Ebner.)

Q. You have searched among the papers you had there?

A. I asked them last fall and they looked for it.

Objection overruled. Defendant allowed an exception.

Mr. WINN.—I will read it into the record. I will furnish a certified copy.

(Certified copy is attached hereto and made a part hereof.)

Q. Now, Mr. Ebner, I will ask you what you did, if anything, with reference to staking out and marking the discovery of this particular claim as described in this location notice just read—I will withdraw that question. What did you do with regard to staking out and marking the boundaries upon the ground of this lode claim which is described in this notice?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial, no proper foundation having been laid.

Overruled. Defendant allowed an exception.

A. Why, when I got ready to stake I took several men from the crew that I had working in the Ebner mine and went out and brushed out from the Lotta stake in a southerly direction.

Q. Take that map or plat marked exhibit “B” and tell the Court just where you brushed out with reference to the Lotta lode claim. Describe on that exhibit what line you brushed out, giving the names of the corners, if you will.

(Testimony of William M. Ebner.)

A. I came here and we brushed along this line (indicating).

Q. What line is that?

A. That is the southwest side line of the Lotta lode claim; we brushed out—this is north, that would be the southwest—it is the southwest side line of the Lotta lode claim.

By the COURT.—That would be the southeast corner? [140]

A. The southwest corner of the Lotta—this is the southeast—that is north and that is south as near as can get it.

Q. What corners are they,—how are they numbered? Call out the number you started from.

A. I started at Post Number 5 of the Lotta lode claim and brushed in a northwesterly direction along the side line of the Lotta lode claim; came over here and found this stake, Post #6, and set up a flag there, and we brushed along that line down very near the creek there and then got a sight through that and came out here along what is called the Royal lode claim, one hundred and twenty-five feet, measuring with a tape-line, and then with a pocket compass made a square turn, came over here six hundred feet; in the first place, we made a sort of preliminary survey and got it in here, because I wanted to get the distance from the croppings; this location notice here is set on quartz croppings actually in place, and after we made this preliminary survey and surveyed in here, we got the distance of

(Testimony of William M. Ebner.)

about what it would be in here. We came around here and brushed up around this claim.

Q. Around the Parish Number 2?

A. Around the Parish #2; and as we came along that set of posts here, one hundred and twenty-five feet in a southerly direction, we came here, and we had this post set here, the location post, and then we passed on and set the southwest corner of the Parish—came over here and set this post approximately—this runs up to some other property.

Q. What post would that be?

A. That would be the northwest corner of Parish #2.

(By the COURT.)

Q. What do you call this point here? [141]

A. That is the northwest corner.

Q. What is that corner, then?

A. That is the northeast.

Q. What is that? A. Southeast.

Judge WINN.—If you will call them by the numbers it will be better.

The WITNESS.—What I call the northwest corner is Post #6, and what I call the southwest corner is Post #5.

Q. What, if any, stakes did you set on the Parish #2 and what kind of stakes?

A. We set big alders and set alder stakes.

Q. About what size?

A. Some of them were three inches in diameter.

Q. Was there any portion, any of the side lines of the Parish #2, made a common side line of the

(Testimony of William M. Ebner.)

Lotta? A. Yes, sir.

Mr. SHACKLEFORD.—We object, for the reason that it calls for a conclusion of the witness. At the time the location of the Parish #2 was made, as I understand it, the Lotta had gone to patent, and we want to have the record show distinctly that we make objection to any reference of the witness to the identity of any of the lines with the patented claim, except as he may refer to the old stakes.

Objection overruled. Defendant allowed an exception.

Q. How is that, Mr. Ebner?

A. I don't exactly remember that question.

Q. I asked you if any portion or any one of the side lines of the Parish #2 as staked out and brushed out by you had anything to do with or was in common with any part of any one of the side lines of the Lotta claim? [142] A. Yes, sir.

Q. What portion and what side lines?

Mr SHACKLEFORD.—Same objection. Objection overruled and defendant allowed an exception.

A. All of the side lines; with the exception of the 125 feet, we aimed to keep the two lines, the Lotta side line and the Parish #2, identical, because we wanted to join them together and that is what we had to go by; we wanted to identify them by that line, and then we came up on the Royal; we found the Royal stake which we knew was a patented claim.

Judge WINN.—I want to withdraw the witness for a moment while I call Mr. Pond.

By the COURT.—Very well. [143]

[Testimony of Percy Pond, for Plaintiff.]

PERCY POND, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. I will hand you a photograph and ask you if you know anything about that and who took it.

A. I made the negative from which that photograph was made last November.

Judge WINN.—I suppose you will admit that Mr. Pond is a photographer?

Mr. HELLENTHAL.—Yes, sir.

Q. Who took you upon the ground that is shown in that photograph and showed to you what they desired you to photograph? A. Mr. Wettrick.

Q. Now, that photograph was taken up on Gold Creek on the piece of property up there that Mr. Wettrick took you upon to have you take the photograph, was it? A. It was.

Q. I will ask you if that is a just representation of the landscape and the objects that are contained in there? A. It is.

Q. Is there anything else besides that white stake there that was pointed out to you which was desired to be taken in that photograph?

A. There is a building here which is designated by a white mark—a handkerchief was pasted on the face of the building.

Q. What kind of ink shows best on that photo-

(Testimony of Percy Pond.)

graph so you can mark more plainly where that building is?

A. There is another photograph showing the building there—the same stake.

Q. I wish you would mark the date on the back of that when you took it. [144]

A. It is marked in the front 11/22/10—that signifies the 22d day of November, 1910.

Q. You know nothing particularly what those stakes were—that corner posts or stakes—all you know is you just went there and took the photograph as indicated by Mr. Wettrick? A. Yes, sir.

The photograph is marked for Identification Plaintiff's Exhibit "H."

Q. I show you another photograph and ask if that was taken by you. A. It was.

Q. The same date the other was taken?

A. The same date.

Q. Is there anything particular in that photograph that your attention was called to, that Mr. Wettrick desired to have included in the photograph, besides the big white post there?

A. There is a building in the distance on a line with the stake—the building is up in the brush.

Q. I wish you would mark that by the letter "a." (Witness does so.)

The photograph is marked for Identification Plaintiff's Exhibit "I."

Q. I have another one that shows some objects upon it. I will ask you what besides the white post

(Testimony of Percy Pond.)

there was your attention called to, to include in that photograph.

A. The same building shows in the distance and the side line close to the building.

Q. Is that a photograph of the same post that these other two identified exhibits contain?

A. No, sir. [145]

Q. It is not the same post? A. No, sir.

Q. Where is that post with reference to any other natural object on the ground up there—can you particularly describe it?

A. It is on the basin road, about midway between Cape Horn and the Ebner mill.

Q. Going up the creek, it is on what side of Gold Creek? A. On the left-hand side going up.

Q. On the left-hand side going up the creek and pretty nearly opposite—what did you say the Ebner mill or the air-compressor?

A. Well, you can see the steps leading down to the air-compressor in the picture.

Q. These other photographs you took of a post which you have just identified—where was that post with respect to Gold Creek going up?

A. It was close by Snowslide Gulch.

Q. On the right or left side going up?

A. On the right-hand side.

Q. On the opposite side that the photograph you have in your hand shows the post to be in?

A. Yes, sir.

Q. Was your attention called to any object between those two posts that it was desired be em-

(Testimony of Percy Pond.)

braced in that photograph? A. No.

Q. Where is the brush? Was there a brush outlined there?

A. You can see the brush outline leading close to the building which shows in the other photograph.

Q. The brush outline you have reference to was over on the [146] right-hand side of the creek—you went up near that little old building?

A. Yes, running toward Snowslide Gulch.

Q. On the right-hand side of the creek as you go up, near that little old building where the post appears in these other photographs? A. Yes, sir.

The photograph is marked for Identification Plaintiff's Exhibit "J."

Q. Here is another photograph which seems to have been taken very close up to the objects they desired represented there—did you take that photograph also? A. I did.

Q. Where was that post that you photographed in that picture with reference to the other post that you have just described in the other photographs, or is it one of those same posts?

A. It is higher up on the hill above the new flume that they were building.

Q. On the left-hand side of the creek as you go up? A. Yes, sir.

Q. And what is that post numbered there?

A. It seems to be 6—S. 87.

Q. It is a matter of reading, I suppose?

A. Yes.

(Testimony of Percy Pond.)

It is marked for Identification Plaintiff's Exhibit "K."

Q. Now, I have one more—was there any other object called to your attention to be included in that beside the post?

A. There is a post in the foreground and about between 100 and 150 feet or so is this same post that is close to the building and is shown on the first two photographs I identified. [147]

Q. In other words, it exhibits a post about 100 feet or so from the post near the buildings in the other photographs?

A. The one in the foreground; yes.

Q. Is there any other object in there that you see that your attention was called to to include in that photograph that you identify at this time?

A. No.

The photograph is marked for identification Plaintiff's Exhibit "L."

Witness excused.

[Testimony of F. J. Wettrick, for Plaintiff.]

F. J. WETTRICK, called and sworn as a witness in behalf of the plaintiff, testified as follows: (By Judge WINN.)

Q. You heard the testimony of Mr. Pond about you taking him up there to have some photographs made. I hand you this one that has been identified as "H" and ask you, without reference to the surveys, where that post is and what objects you desired Mr. Pond to include in that photograph. Identify them with reference to something like a

(Testimony of F. J. Wettrick.)

building or some road or something of that kind and I will question you later as to what corner posts you think they are.

A. That is a post that is found near a certain cabin alongside a road known as the Coulter road, and in having that photograph taken I desired Mr. Pond to include in that the line that was brushed out up over the hill and to show as many stakes as could be shown in that line and also show [148] the line running over toward the main road, the road leading up to the mine.

Q. Then that post is on the right-hand side of the creek as you go up the creek?

A. It is on the right-hand side of the creek.

Q. And approximately what distance from the creek, just approximately now. I will ask you to give the exact distance later on.

A. Approximately 600 feet.

Q. You desired to show, then, from that post near the cabin something that is brushed out across the creek and some other object on the left-hand side of the creek?

A. Yes, sir, to show the line that was brushed out leading toward the creek and crossing the creek and leading up toward the road where is found another stake which this picture does not show.

Q. Here is another one marked "I." What particular objects did you have that taken so as to include there?

A. I wanted that particularly to show the stake, the post shown in the ground there, with reference

(Testimony of F. J. Wettrick.)

to that same certain cabin referred to in the other picture.

Q. Can you see the cabin or where it is represented by some other object?

A. The cabin is designated here as "a" and shows plainly enough.

Q. Here is "J." What is that picture—what is in it that you desired to have Mr. Pond photograph?

A. I wanted him to show the exposed corner stake—the stake shows here on the picture with the markings on it and looking across Gold Creek to show the line as brushed out over [149] the hill there and the cabin on the other side.

Q. What side of the creek is that post there?

A. That is on the left-hand side going up—that is the way you refer to them, I think.

Q. And the line you call brushed out is on the opposite side of the creek in the direction from that post to the old cabin?

A. Yes, sir; and the old cabin also shows on this picture about some sixty feet from the line which is brushed out.

Q. Exhibit "K"—what did you desire embraced in that? What did you have Mr. Pond photograph there?

A. I had Mr. Pond particularly to try to get the stake that is shown here on the picture, with the marking upon it, and show as much of the new flume and the structure of the flume and mine as possible—the idea here was to show the stake as it was found on the ground.

(Testimony of F. J. Wettrick.)

Q. Just photograph it as it was on the ground?

A. Yes, sir.

Q. And there was no other particular object for that picture to be taken? A. No.

Q. Here is one marked "L." What particular ground or what particular object did you desire photographed in that?

A. I wanted to show in this photograph the stake which is shown there as the first one; wanted to get the cabin in there as well, but I don't think it shows very plainly here in the brush. The thing was to show this stake as shown here and the line as brushed out across the creek over toward the road and show the flag-pole on the other side of the road by the stake, as is shown in one of your other exhibits. [150]

Q. That post is on which side of the creek as you go up?

A. This first one is on the right-hand side going up the creek, referred to as the Coulter road.

Q. That is not the same as the regular traveled basin road?

A. No; that is an old road on the right-hand side of the creek.

Q. In what relation is that road with reference to the air-compressor, as it stands up there now—is it over across the creek from the air-compressor?

A. Yes.

Q. Does it extend that far up the creek?

A. It extends from the mine or mill, the old Ebner mill, down over the ground to the neighborhood

(Testimony of F. J. Wettrick.)

of that post on the Parish claim. I referred to the road because that is the natural object.

(By Mr. HELLENTHAL.)

Q. One of these pictures shows stake #6, that is the one near the flume—as shown in that picture.

A. I believe a marking on a certain stake there is 6 S.87, that is on the left-hand side of the creek going up, above the new flume a short distance.

Q. Above the new flume? A. Yes, sir.

Q. And some distance above where the other stake is standing that has also been photographed on that side of the creek?

A. The post by the road you refer to?

Q. Yes. A. Yes.

Q. Some distance up the creek from there, a little ways up the creek?

A. No; I don't get your idea there.

Q. The post that you have photographed here, situated right [151] near to the basin road—there is one post there? A. Yes, sir.

Q. This other stake is a little ways up above the flume? A. Yes, sir.

Q. Is that not true? A. Yes, sir.

Q. A little up the creek? A. Above the flume.

Q. When were these taken—they were all taken the same time, were they not?

A. Yes, sir, the date is on the picture. I don't remember the date; you will find it on the photograph.

Q. The dates are on the photographs?

(Testimony of F. J. Wettrick.)

A. Yes, sir.

Q. I wish you would look over these dates on the pictures to see that they are the correct dates on which they were taken.

A. Two of those were taken on the 22d day of November, according to Mr. Pond's notation, and two on the 24th.

Q. Last year? A. Yes, sir.

Q. They were all taken in the month of November, last year? A. Yes, sir.

Q. Independent of the notation, you know they were taken in November, last year?

A. As far as I remember, yes.

Q. I don't care about a day or two; that don't make any difference. A. Yes.

Q. This other one was also taken in November of last year? A. 11/22/10—the 22d day.

Witness excused. [152]

**[Testimony of William M. Ebner, for Plaintiff
(Recalled).]**

WM. M. EBNER—direct examination continued:
(By Judge WINN.)

Q. Now, going back to your examination, I think I had you tracing out the boundary lines of the Parish No. 2 lode claim. I will ask you to take this exhibit here, Plaintiff's Exhibit "D," and ask you if any of these corner posts and stakes that you set for the Parish #2 were on any of the side lines, or any of the lines of the Lotta claim as indicated on this exhibit?

Mr. SHACKLEFORD.—Objected to as incompe-

(Testimony of William M. Ebner.)

tent, irrelevant and immaterial, and not a competent question, for the further reason that the witness has no right to identify the markings on the ground with the exhibit that has not yet been applied to the ground; we object to the witness making any statement with reference to the position of the side line in connection with the position of the actual patented lines of the claim.

Objection overruled. Defendant allowed an exception.

A. Yes, sir; the northeast corner of the Parish #2 was set as near as we could get it on the side line of the Lotta claim.

Q. About how far from any one of the corners of the Lotta claim?

A. About 125 or 150 feet from the northwest corner of Post #6, as given on this plat.

Q. Did you brush out any from that corner in any direction? A. Yes, sir.

Q. In what direction with reference to this lower side line of the Lotta claim?

Same objection. Objection overruled. Defendant allowed an exception. [153]

A. We brushed out first in a northwesterly direction, followed the line and brushed it out; then we had to cross the creek there—I had a telephone there—and measured it off with a tape-line as 600 feet, and we stretched that across. We had to get up and down with a hundred feet tape-line and that is the way we located this corner here, and when we got 1500 feet from the post, 125 feet south of the post

(Testimony of William M. Ebner.)

#5 of the Lotta, why we set this stake here.

Q. (By Mr. SHACKLEFORD.) What corner is that?

A. That is the northeast corner of the Parish #2.

Q. I understand, then, that you set one stake about 125 feet—

A. About 150 feet, something like that, I don't know exactly, on this side line, as near as we knew, because this side line was brushed out across the creek here and brushed out partially up the hill.

Q. What direction did you go from that post to make the upper side line of the Lotta claim?

A. This one?

Q. The upper side line—that is, going up the creek?

A. Yes, sir; if I remember right we came out here across 600 feet, set this post here.

Q. As I understand it, you followed along the lower side line of the Lotta claim right in a straight line, far enough out to make the upper side line of the Parish # 2 claim fifteen hundred feet.

A. Yes, sir.

Q. And put a post at that corner? A. Yes, sir.

Q. And how did you turn—at right angles from that? How did you run with your next line of the Lotta claim,—from the [154] projection of the lower side line of the Lotta claim? You said you set a post until you got out 1500 feet and then turned—in what direction did you turn, at right angles or at what angle did you turn with respect to that side line and run another distance?

(Testimony of William M. Ebner.)

A. If I give it as we actually staked it out, we came on here first 125 feet—

Q. In a straight line?

A. This line was brushed,—the line along the Royal lode was brushed. We came out here 125 feet and put a stake.

Q. You continued in the same direction as the projection of the lower side line of the Lotta claim?

A. Yes, sir.

Q. And when you got it there—

A. We turned at right angles.

Q. And how far did you run? A. 600 feet.

Q. And what did you do there, if anything?

A. Then, we turned at right angles and ran 1500 feet and then turned at right angles and ran 660 feet, and then came along here to see how near perfect this was because this turned, and it check out. We measured all the way along up here until we got back to the posts here—we measured clean around the claim, all around the claim.

Q. Did you make any corner posts at these different corners?

A. Yes, sir, at every corner we put a post.

Q. Then, as I understand it, you staked out a claim there that was 1500 feet long, intended to be, as near as you could measure it? A. Yes, sir. [155]

Q. And 600 feet wide? A. Yes, sir.

Q. And have the end and side lines parallel?

A. Yes, sir.

Q. What, if anything, in the way of precious

(Testimony of William M. Ebner.)

metals did you discover upon the area which you have just described within the side lines and end lines of the Parish #2 claim?

A. I discovered quartz in place carrying gold values, very near, within a few feet of where the location stake was set.

Q. Where did you set the location stake?

A. That stake, the location on the south, as I said, we went up 125 feet and then turned at right angles, went across, and at 300 feet we set the location stake and at the end of 600 feet we set the corner post, and this location stake came within a very short distance of the place where I had discovered quartz in place carrying gold, on the north side of what is called the Borean pit, the old placer pit mined years ago, and I discovered there rock in place carrying values where this crossed the creek.

Q. Where the old line—

A. Where the old line crossed the creek, about 4 or 500 feet from that, not exactly in the centre of the claim but along in there I found where it carried values.

Q. This was all, as I understand it, within the exterior boundary lines of the Parish #2?

A. Yes, sir.

Q. And near the centre of the claim?

A. Very near the centre of the claim—we discovered it very near the centre, within a few feet, probably.

Q. I will ask you if you had any of that quartz assayed? [156]

(Testimony of William M. Ebner.)

A. I did at the time; I did before I made any location, yes—I had it assayed when I discovered it.

Q. What values, do you remember, that you found?

A. I think that one next to the Borean pit I got two dollars and forty cents; down further in the creek I think I got \$1.50 or \$1.60.

Q. Now, you are pretty well acquainted with the general run of ores on that property all up and down the creek there—what is about the general value of the ores that is being mined up there?

A. From \$2.00 to \$3.50—from \$1.50 to \$3.50.

Q. How does that compare with the general run of milling ore that has been mined and milled up there?

A. That compares very favorably with what I have been running.

Q. On this same property? A. Yes, sir.

Q. Now, Mr. Ebner, you said some time ago, I believe, in your testimony, you stated as to what time you became acquainted with the ground that is referred to as the Lotta lode claim and said that you had seen some stakes up there for some length of time. I will ask you to state to the Court when it was that you first discovered any stakes along the line that you have been terming here on this map as the lower end line of the Lotta claim?

A. I saw stake #6 on the Lotta claim—it was pointed out to me and I saw that in 1892.

Q. In 1892?

A. Yes, sir, and stake #5 I first became acquainted with that the next or following spring, in 1893.

Q. I will ask you what you have done since you

(Testimony of William M. Ebner.)

first discovered [157] those stakes with reference to keeping them up and replacing them at times when the old ones became rotten and decayed.

(Objected to and question withdrawn.)

Q. You said in 1892 you saw a stake that was marked #6, or something. I will hand you this photograph which has been identified here as Plaintiff's Exhibit "K"—you have seen this photograph before? A. Yes, sir.

Q. And I will ask you if from the looks of that photograph and what is shown thereon and from the testimony of Mr. Wettrick and Mr. Pond—if you know where that stake is on the ground?

A. Yes, sir; this stake is what is marked Post #6 on the plat.

Q. Then, you stated awhile ago that you had become acquainted with Post #6 in 1892?

A. Yes, sir.

Q. I will ask you if the same post—if that post shown in the photograph is the same post that was there in 1892?

A. It looks just the same—just the same post.

Q. Have you seen that post right along?

A. Well, I saw it again in 1893 and I have seen it at different times; I have not seen it for a couple of years. I have not seen it for three years, I don't think, but I remember the post and the way it sets there and the markings on that, and the trees more particularly, the surroundings. I know the post looks just like the one I saw when I first saw it and the trees and surroundings near this exhibit—the

(Testimony of William M. Ebner.)

post seems to be dipped just a little bit more—it used to stand up straight.

Q. You haven't seen the post, you say, for about three years? [158]

A. No, probably longer than that.

Q. Now, about how frequently between 1892 and up to three years ago did you see that?

Mr. SHACKLEFORD.—We object to that as too general and indefinite.

Objection overruled. Defendant allowed an exception.

A. Why, the way I came to see this post, I was purchasing some property now called the Dora group—it used to be the Wyman group—and while I was negotiating I wanted to know where the end lines were and where they joined on, and a man that knew where these posts were, he went around and showed me these posts, and that is the way I know.

Mr. SHACKLEFORD.—We object to the witness testifying to any conversation or action by another person as hearsay and moved to strike the testimony.

Objection overruled and motion denied. Defendant allowed an exception.

Q. Do you remember what the man's name was?

A. A man named Mike Dunn.

Same objection and motion to strike. Objection overruled. Defendant excepts. Exception allowed.

Q. I will ask you if you talked about—if you had an object in finding the boundaries—this Dora property, does any of it abut or join on the Lotta claim or any of that property there? A. Yes, sir.

(Testimony of William M. Ebner.)

Q. The Dora group of claims you afterwards became interested in?

A. Yes; I became interested in the Dora long before I did in the Ebner group, and I looked up those boundaries, more particularly this corner and the north end lines as well as [159] the side lines of the Lotta, in order to ascertain where they claimed their locations and where the stakes were and what vacant ground there might be in there.

Q. That was in 1892, before you became interested in the Ebner property? A. Yes, sir.

Q. Where is that post with reference to any natural object—a road or anything that runs up there, the wagon-road?

A. If you go up the road or walk along the road until you are right in line with the creek and the high falls and then turn around and look up the hill, it is right square up the hill, a very steep hill, above the road on the left-hand side of the road in a little bunch of timber; you can see it plain from the road.

Q. On the left-hand side of the creek as you go up the creek?

A. On the left-hand side of the creek and on the left-hand side of the road.

Q. What direction with reference to the air-compressor or mill?

A. It would be northwest from the mill. It would be northwest from the air-compressor and almost directly west from the mill.

Q. (By the COURT.) Opposite the upper or high falls?

(Testimony of William M. Ebner.)

A. Yes, there is a stake on the road and taking that stake in line with the falls and squaring around, it is in line with that, but up the hill.

Mr. SHACKLEFORD.—The stake that you have just been testifying to is the stake marked on Exhibit “K” for identification?

A. On Exhibit “K.”

Mr. SHACKLEFORD.—That is the original stake pointed out to you?

A. Yes, sir. [160]

Q. Now, I will hand you a photograph that has been identified here as “I” and ask you if you are acquainted with that stake. A. Yes, sir.

Q. Are you acquainted with that old building there? A. Yes, sir.

Q. When did you first find any stake set in the same place or nearby—what time did you become acquainted with the corner post?

A. In the year 1893.

Q. That is one of the end lines of the Lotta claim?

A. Yes, sir, identical with post #5 marked on the plat there; what I call the southwest corner—this shown in the photograph here is not the original stake.

Q. You have become acquainted with the stake in 1893 and the cabin was there in 1893?

A. Yes, sir.

Q. What has become of that stake that was first there? You say you don't think that stake in the photograph is the same stake?

A. I didn't see that stake in the photograph; the

(Testimony of William M. Ebner.)

original stake, last fall when I was up there or last winter, rather, was right alongside of this larger stake shown in this photograph, and that stake, some six or seven years ago, I found that it had rotted and was just standing up, that is all, so I drove a stake alongside and wired it up to that.

Q. Put in a new stake?

A. Yes, sir—not this stake here; then we came along later and put in this stake right in the same place where the other stake was driven and the original stake was left standing [161] and nailed or wired to this stake and that original stake or what was left of it was there last fall or winter when I was up there.

Q. In 1893, when you first became acquainted with some sort of a corner post there, was there any marks that you could discern on that old corner post standing there, do you remember?

A. Yes, sir, I remember it was post #5; I know it was marked about the same as that plat there and U. S. Survey 87. I know it had those survey marks on. I couldn't say offhand what they were, but I think that is what was on there.

Q. Now, when you again saw that stake some time later on, you say it had become very much decayed. About how long was that after the year 1893?

A. That was probably along about—I think that was about eighteen—I don't just remember what year.

Q. Approximately how many years after—three or four or five years after?

(Testimony of William M. Ebner.)

A. Yes, five or six years afterwards.

Q. Now, about what distance was that old stake you saw there from that old cabin standing there?

A. I think it was about 60 or 70 feet, something like that. I don't know exactly.

Q. Now, when you replaced that with another stake, in what place did you replace that new stake with respect to the old cabin or where the old stake stood?

A. On the inside, leaving the stake on the outside; we were leaving the old stake still on the corner, but driving the new stake just behind it.

Q. What do you say as to whether or not that old stake when [162] you set the new stake was in the same relative position as when you first saw it?

A. Yes, it was.

Mr. HELLENTHAL.—We object to all the testimony offered with reference to the stakes on the ground of the Lotta, for the reason that the patent notes describe the Lotta claim with reference to natural objects and it doesn't make any difference where the testimony may show the stakes were, etc. Objection overruled. Defendant allowed an exception.

Q. Here is another photograph that is marked Exhibit "L." Is that either one of the stakes that you have been already describing as far as you can discern from the photograph, or do you know anything about it? A. No, sir, it is not.

Q. That is another stake? A. Yes, sir.

Q. Where is that stake?

(Testimony of William M. Ebner.)

A. The stake is about 125 feet in a southeasterly direction from the stake that I last described there and is what I call the Parish #2, the southeast corner of the Parish #2.

Q. Now, do you know anything about the setting of that corner? A. Yes, sir.

Q. Tell the Court what you know about it.

A. That stake is placed precisely where the original location stake was placed. I had the line brushed out and had it resurveyed, or run a survey around there, I think, in 1908, and this stake was placed here at that time in the identical spot where the original location stake was placed.

Q. Of what claim? A. Of the Parish #2.
[163]

Q. What corner stake is that? Is that the corner stake—

By the COURT.—He said a location stake.

The WITNESS.—No, the corner stake, the southeast corner stake of the Parish #2.

Q. Is that the stake you described to the Court a while ago, that you attempted to set in a line with the lower side line of the Lotta claim?

A. No, sir—no, this is not the one, this is on the side line of the Royal,—it is above, beyond, the side line of the Lotta.

Q. Yes, but if the side line of the Lotta was extended in a straight line, would it strike that?

A. Yes, sir.

Q. If the lower line of the Lotta was extended in a straight line, it would strike that post?

(Testimony of William M. Ebner.)

A. Yes, sir.

Q. Now, here is another photograph called Exhibit "H"—do you know anything about that stake?

A. Yes, sir.

Q. State to the Court what you know about it.

A. This is the post #5 as shown on that plat there, post #5, the southwest corner I call it, of the Lotta lode claim.

Q. Southeast corner, you mean,—5 here on Exhibit "B"? A. Yes, sir.

Q. What else, if anything, does that picture show?

A. That shows the end line of the Lotta and probably a portion of the Taku Gold & Silver brushed out, but most all of the end line of the Lotta.

Q. That is, it would be what end line of the Lotta?

A. The south, or the southeast end line of the Lotta.

Q. Is there any other object there that you desire to call [164] the Court's attention to?

A. Yes, I see a stake up on the hillside there.

Q. What stake is that?

A. That is one of the end line stakes of the Lotta lode claim,—and I think that is the lode line stake,—I wouldn't be sure about it.

Q. Of what,—of the Lotta?

A. Yes, of the Lotta.

Motion to strike latter part of answer as a conclusion.

Q. Do you know anything about that stake on the ground?

A. I have seen that stake on the ground quite a

(Testimony of William M. Ebner.)

number of times or a stake that looks just like it; I am satisfied that it is the lode line, 150 feet from the corner, from the looks of the ground here. A photograph somewhat distorts it, though, but I am quite well satisfied that is the place, but I know that is the end line,—I can tell that by the objects,—I know it is the end line of the Lotta.

Motion denied. Defendant allowed an exception.

Q. Here is another photograph marked Exhibit “J” for identification. How about that stake?

A. Yes, sir, I know where this stake is.

Q. Is that either one of the stakes you have been describing? A. No, sir.

Q. Where is that stake with reference to any natural objects?

A. That stake is alongside the Basin road, originally driven alongside the stringer to the bridge here, and is opposite, almost opposite, the compressor-house and is the end line of the Forrest and the side line of the Lotta.

Q. Is that stake there now?

A. It was there last fall. [165]

Q. It was there last fall and that is the last you saw it? A. That is the last time I saw it.

Q. How long have you noticed the stake being there? Whether it was this stake or some other stake, you can explain to the Court, but how long have you noticed the stake being there, approximately there at that same point?

A. That stake has been there, I think, ever since

(Testimony of William M. Ebner.)

1893 or 1894, when that ground was first surveyed for patent.

Q. That is one of the stakes of the Forrest lode claim?

A. That is one of the stakes of the Forrest claim, yes, sir.

Q. Have you had anything to do with the Forrest claim? A. Yes, sir.

Q. What does that belong to?

A. That belongs to what is called the Dora group.

Q. You are interested in that group of claims?

A. Yes, sir.

Q. Did you have that claim surveyed for patent?

A. Yes, sir.

Q. You had that surveyed for patent?

A. Yes, sir.

Q. Do you know that is the same stake?

A. That is the same stake and the same place.

Q. Do you know approximately when the survey was made?

A. I think it was made in 1893, I wouldn't be sure, but I think that is the time it was made.

Q. And it belonged to the Dora group of claims while you were interested in that group of claims?

A. Yes, sir.

Q. Who made that survey?

A. Charley Garside. [166]

Q. You are acquainted with the boundaries of that Forrest claim by reason of the survey and being a part owner, and you know that to be one of the stakes of it? A. Yes, sir.

(Testimony of William M. Ebner.)

Q. Do you know whether that stake was placed there before or after the Lotta survey?

A. It was placed there afterwards.

Q. It was placed there at the time the Forrest survey was made? A. Yes, sir.

Q. On what you contend to be the lower side line of the Lotta claim? A. Yes, sir.

Mr. SHACKLEFORD.—We object to that as being argumentative and calling for a conclusion of the witness and leading.

Objection sustained as leading.

Q. Where is it, then, with reference to the lower side line of the Lotta claim, on it or above it?

A. It is right on the line.

Q. You claim that in 1892 you became acquainted with the corner post that you identify in these photographs over there, located near this old cabin, and which you claim to be one of the corner stakes of the Lotta claim. Now, what other stake along that side line of the Lotta as you contend is the side line—besides this stake that you have described as being a corner post of the Forrest and showing the intersection of the Forrest with the lower side line of the Lotta, have you found any other stake along that line? A. I have not.

Q. Did you ever find the corner stake of the Lotta, that is, along that line where this Forrest intersects the Lotta? [167]

A. The corner stake of the Lotta?

Q. Yes. A. Yes.

Q. I mean along the side line,—you contend on the

(Testimony of William M. Ebner.)

lower side line there that the Forrest survey intersects one of its lines, a part of the Forrest set over on to the Lotta? A. Yes, sir.

Q. Now, have you got one of the posts there of the Forrest—on that same side line, the Lotta side line, outside of the stake you found there next to the cabin—have you found any other or seen any other stake there on that side line?

A. Not on the side line.

Q. Not on that side line? A. No, sir.

Q. What, if anything, have you done since you first became acquainted with the Lotta claim with regard to keeping this line of the Forrest and the other stake over across the creek near the cabin, along that line—what have you done in regard to keeping that brushed out or having that line resurveyed, since you first became acquainted with that property in 1895?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. The first that we brushed out the side line of the Lotta was when we made the Forrest survey.

Q. (By the COURT.) When was that?

A. That was in the year 1893.

Q. In 1893 was it?

A. Yes, I am quite sure it was 1893.

Q. The survey will show it anyway? [168]

A. Yes, when that survey was made for the Forrest.

(Testimony of William M. Ebner.)

Q. You had that official survey made for the Forrest?

A. Yes, then I kept the stake brushed out. As soon as I became interested in the Ebner property I looked up all my stakes to preserve them, and the next time we brushed out that line was when we made the location of the Parish #2, and then I had it all rebrushed out and resurveyed in the fall of 1908.

Q. When the survey was made for the Forrest claim, whatever date that survey was—we will show the exact date later on—did you at that time see anything of this corner post that is over there near this old cabin? A. Yes, sir.

Q. And you next had that same line brushed out in 1908?

A. No, in 1899, when we located the Parish #2.

Q. Was that stake over there at the cabin at that time? A. Yes, sir.

Q. That is some stake—I mean one of these stakes there—was it a new stake?

A. No, when we made that location the old original stake was still in place.

Q. Since 1899 did you do anything towards brushing out that line?

A. Yes, we brushed out that line in 1908 around the stake; we kept that clear and kept the brush pretty well cut away from that, and the line uphill we brushed that out, I think, along about the same time, in 1899.

Q. Was that one of the end lines of the Lotta?

A. Yes, sir, the end line of the Lotta.

(Testimony of William M. Ebner.)

Q. Do you know who aided and assisted in doing that brushing [169] out in 1899—is there anyone here now?

A. I don't know if anyone is here now in particular. I took men from the crew.

Q. From your mill up there? A. Yes, sir.

Q. You were running the Ebner mill then?

A. Yes, sir.

Q. Now, in 1908, when you say you had some survey made there and some brushing out, who was with you at that time?

A. Well, I had Mr. Tripp, Mr. Hill, Mr. Wettrick and several more,—I don't remember all of them just now.

Q. What were you doing?

A. We were brushing out the lines and I told them to make the survey just about the same as they would make it for a patent.

Q. Of which? A. Of the Parish #2.

Q. Now, Mr. Shackelford said something this morning in his opening statement to the Court that Mr. Hill made some surveys for you of the Parish #2 at the time you staked it out—did he ever make any survey of the Parish #2, when you staked it out?

A. No, Mr. Hill was not present and was not around there,—I didn't employ Mr. Hill at that time.

Q. You made the location of the Parish #2 yourself, and who else was with you?

A. I had different men from the crew. I think my foreman was with me at that time.

Q. Who was he?

(Testimony of William M. Ebner.)

A. I don't remember. I think he was a man named Ross. I [170] wouldn't be sure. I didn't have the same people every day.

Q. About how many men did you employ up there around the mill?

A. I had five or six men part of the time.

Q. How many did you have in your employ running the mill? A. I had some thirty odd.

Q. And some of these people you took down there to assist you? A. Yes, sir.

Q. But in 1908 you had Mr. Tripp and Mr. Hill and Mr. Wettrick with you?

A. Yes, sir, and a man watching up there, the watchman, and I think a man named Kirk—I don't just remember how many men I had.

Q. Mr. Kirk is here also now? A. Yes, sir.

Q. Now, Mr. Ebner, that brushing out you did on what you are testifying about as being the lower side line of the Lotta, the brushing out you did in 1908,—how did that compare with what you did in 1899 with respect to being over the same ground?

A. It was over the same ground,—the brush had grown up again but we could see the old stumps, where it had been cut down.

Q. In 1908 when you did this brushing out, was this corner post you have described as being one of the Forrest stakes, that is 1908 when you did the brushing out—this stake that you have described as being one of the Forrest stakes, which you claim is on the side line of the Lotta claim, and also the stake over at the cabin—were these stakes there in 1908 when

(Testimony of William M. Ebner.)

Mr. Tripp and these people helped you brush it out?

A. Yes, sir. [171]

Q. Now, I will ask you, outside of these stakes, have you ever seen any other stakes of the Lotta lode claim, outside of those in the picture here that you have spoken about, did you see any other end line stakes—did you ever discover any of those or were they taken out by slides,—what do you know about that?

A. I saw the stakes described in the photograph, shown in the photograph. I saw all three of the end line stakes.

Q. Of what? A. Of the Lotta.

Q. When did you first see those?

A. I don't remember. Soon after I became interested in the property, soon after the organization of the Ebner Gold Mining Company, the next year.

Q. What have you done in regard to keeping those posts kept up?

A. I always done all I possibly could to preserve them.

Q. Was any of that ground subject to slides, where some of those end stakes were?

A. Yes, some of them were.

Q. How is this ground in reference to slides where this stake is near the cabin—has there been any slide there? A. You mean the ground or the hillside?

Q. I mean where the post is, next to the cabin.

A. No, I don't think so, not those, but further up there has been slides.

Q. Around this cabin if there had been any slides

(Testimony of William M. Ebner.)

of land there and where the stake is set for the cabin, you would have noticed it? A. Yes, sir.

Q. Well, has there been any slides? [172]

A. No, sir, there has not.

Q. Do you remember what stakes you saw on this Lotta claim besides the stake over there at the cabin, that is, when you first became interested in the property, along about that time,—in 1895?

A. I saw what was called the lode line stake.

Q. You say you saw what would be the lode line stake. Where was that stake with reference to this stake that you saw over at the old cabin?

A. That was 150 feet on the end line from the corner stake or stake #5, post #5.

Q. Did you notice any markings on that stake?

A. Yes, sir, at that time there was.

Q. Do you remember what they were?

A. I think it was lode line—I don't remember the number, Lotta—and then the survey number on the stake.

Q. Did you see any other stake besides that which you thought to be the lode line and which you read an inscription upon, on the Lotta claim, what you claimed to be that property at that time?

A. Yes, sir; I saw the corner stake of the Lotta 300 feet from post #5 and it would also be the corner stake of the Taku Gold & Silver claim, one stake, right in the corner on one side; it gave the date when surveyed and the other side, the other survey—on one side the Lotta survey and the other the Taku Gold & Silver.

(Testimony of William M. Ebner.)

Q. Any others?

A. I found one more stake and I think it was the lode line stake of the Taku Gold & Silver and then it went up so steep; that is all I found on that hillside.
[173]

Q. Now, what, if anything, did you do with reference to keeping these last described stakes which you supposed to be on the end line of the Lotta claim—have you kept those as well as you kept up the one at the cabin?

Mr. SHACKLEFORD.—We object to that as leading.

Q. Have you kept that up? A. Yes, sir.

Objection sustained. Last question and answer stricken.

Q. I will ask you whether or not you have done anything with respect to keeping these corner posts up? A. I have.

Q. About this lode line stake, what, if anything, have you done—the stake of the Lotta—I am talking about the Lotta?

A. The lode line stake, I think, is just where it has always been.

Q. And what about that other corner stake?

A. The other corner stake—one spring or summer when I went—

By the COURT.—The other? You mean the Taku Gold & Silver?

A. The corner stake of the Lotta and the corner stake of the Taku Gold & Silver, just one stake for both corners. That I found had been broken off,

(Testimony of William M. Ebner.)

and I took the stake and put it back and drove it in right alongside of the stump, so the stump and stake was there, and it was that way the last time I saw it.

Q. What about the stakes of the Parish #2? You commenced the first stake, you say—you set on the lower side line of the Lotta claim that first stake. Have you done anything with respect to keeping that corner intact, or keeping it up since the Parish #2 was located?

A. No, I think the original stake is still there.

Q. And what about the other corner stake you referred to, which was in a direct line or the projection of the lower [174] side line of the Lotta?

A. That stake in 1908 was replaced by a larger stake.

Q. That is when Mr. Hill and Mr. Wettrick were there helping you make a survey? A. Yes, sir.

Q. What did you find when you made that survey in 1908?

A. I found it was getting old and it was rotting, so we made a larger stake there to put in place of it. We found the old stake and put the larger one in place of it.

Q. You testified that you established that stake in the first instance and turned at right angles and then 300 feet further, making 600 feet, you set a corner stake—what have you done with respect to keeping those stakes up since you first staked out the Parish #2 claim?

Mr. SHACKLEFORD.—You are talking about

(Testimony of William M. Ebner.)

the Parish stake?

Judge WINN.—Yes, the end lines of the Parish # 2.

A. The Parish #2 lode line stake, I didn't find that, but we found where it had been and we put a stake there, a corner stake.

Mr. SHACKLEFORD.—We move to strike the answer of the witness stating he found where it had been. If he wants to describe the conditions, I want them specific.

The WITNESS.—We piled some rocks around it.

Objection overruled and motion denied. Defendant allowed an exception.

Q. You say you found where it had been. How do you know that?

A. We found where the rock had been piled around it. We could see where the monument had been and it being in a very prominent place on the rock there, I knew where it belonged where it was originally driven, and the little monument had [175] been scattered some, it still showed, and you could tell there had been a stake there, a monument built there.

Q. Who built that monument in the first instance?

A. I did.

Q. When you first staked the claim?

A. Yes.

Q. That was the corner stake of one of the end lines or was that the lode line stake?

A. That was the lode line stake.

Q. And you say you went into a straight line 300

(Testimony of William M. Ebner.)

feet further and put another corner post in in 1908. What, if anything, did you find with reference to that corner?

A. I found the old stake placed there at the time of location.

Q. What did Mr. Hill and Mr. Wettrick and you people do—did you leave the stake there or re-establish it?

A. The stake was left there. The other survey didn't come down quite as far as this was, and they placed the new stake about six feet further up the hill than what the old stake was. I got the old stake built too far according to their survey and we left the old stake there.

Q. Now, you started from that point to run the lower side line of the Parish #2 claim—did you go over that side line of the Parish #2 with Mr. Hill and Mr. Wettrick and Mr. Tripp when you were there in 1908?

A. I went over it with them as far as the road.

Q. What road?

A. They went as far as the creek and then Mr. Hill or Mr. Wettrick, I think—I don't know which one—took their instruments and went over on the road and I was not present when the entire side line was surveyed, but as far as the road, I was present.
[176]

Q. This property was located, the Parish #2, in 1899. I don't care now to go into any particular details about the work that was done at that time, up to 1906 and '07, and then we will go more par-

(Testimony of William M. Ebner.)

ticularly into detail. Were you there last fall on the Parish #2 claim? A. Yes, sir.

Q. Then, you have been on the Parish #2 since 1908 also? A. Yes, sir.

Q. Did you go over and look at those stakes and corner posts last fall? A. Yes, sir.

Q. That was after Mr. Hill and Mr. Wettrick had made a survey of the claim? A. Yes, sir.

Q. I wish you would commence then and state briefly, unless Mr. Shackleford wants it in detail, commence at the corner post, the first one set on the side line of the Lotta, about 125 or 150 feet from the corner of it, and tell what you saw about that corner post being there last fall?

A. That was there last fall, yes, sir.

Q. And running down 1500 feet to the first corner on a projection of the lower side line of the Lotta, where you established a corner—did you find anything there?

A. I did; we found where the stake had been, but there wasn't any stake there.

Q. What had become of it?

A. I don't know. It had been taken out, but I found just where we had set the stake.

Q. How could you tell it was where you had set it—that is, the corner post on the projection, I am talking about—you [177] come down here 1500 feet and set a stake—that is one of the corner stakes you said you set?

A. We came along here 125 feet; that stake was

(Testimony of William M. Ebner.)

all right, that was there last fall and this stake here 600 feet—

By the COURT.—He misunderstood your first question.

The WITNESS.—That stake around there, the southwest corner of Parish #2 was gone.

Q. Is that the place you say you could tell that that was a corner—was there anything there to indicate the monument?

A. Yes; I saw where we had cut the brush and where we had turned both ways—where we had come down one way and at right angles.

Q. Where you came down the end line?

A. Yes, sir.

Q. And then turned on the other side line?

A. Yes, sir, and there was pegs—I found some pegs—I could locate the corner, and there was a trail built right over this corner.

Q. Who built that trail there?

A. I don't know.

Q. Had any of your people?

A. Not that I know of—I don't know.

Q. (By the COURT.) This right angle business—do you mean you had swamped out the brush?

A. Yes, the southwest corner, which is a little ways from the Snowslide Gulch and that stake—somebody built a trail to get up there from Snowslide Gulch, and built right over where the corner was.

Q. Did you look after any more stakes on the Parish #2 than those you have already described?

(Testimony of William M. Ebner.)

A. I just looked—no, that is all. I came and went up and came down along the side line of the Lotta, that is, the old road, and then came down by Snow-slide Gulch.

Q. What year did you first commence doing assessment work on the Parish #2? A. In 1900.

Q. You say the first assessment work you did was in 1900? A. Yes, sir.

Q. Mr. Ebner, I will ask you if you have any record or recollection as to the number of days' work that was done on this claim in the year 1900?

A. No, I couldn't go into detail. I put my men—took them out there and kept them to work there at their regular wages until I had performed \$100, until the required amount of money or work had been done and money expended at their regular wages. One man would get \$2.00 and his board and the other probably \$2.50.

Mr. SHACKLEFORD.—I move to strike that for the reason that it is not competent evidence of assessment work, etc.

Q. I want to supplement that—

Mr. SHACKLEFORD.—We insist that each year be taken up and the place, time and persons, and the actual work done on the ground be shown.

Q. That first year of 1900, describe as accurately to the Court as you can what you had done on the premises of the Parish #2 lode claim?

Mr. SHACKLEFORD.—We object to the question, unless it specifies in the language of the statute so that the witness is called upon to state the

(Testimony of William M. Ebner.)

work and labor done, and not what he had done on the claim, but the work and labor.

Judge WINN.—I mean his assessment work for the purpose of [179] holding the claim,—that is what we are talking about.

By the COURT.—I think he should describe the character of the work and then set its value.

Q. I will ask you what kind of work and the character of work you did in 1900 in performing your assessment work on this claim?

A. We made an open cut on the Parish #2 just above the creek, where there is a very heavy spring comes out. We made an open cut there and then went to work and turned in some water and commenced, and did, I think, wash out or partially so, so as to get down to the surface, to the bedrock, one ditch leading towards this open cut. I don't remember just the value of each one separately, but those two items together cost in actual expenditure, wages paid to men, more than one hundred dollars.

Q. Was the work actually worth that in the way of assessment work, in benefit of the claim?

By the COURT.—That is leading.

Q. How much did that improve that claim as a mining claim?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial and as calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. I consider that it improved it at least the

(Testimony of William M. Ebner.)

amount of money expended.

Q. Did you say you ran a ditch or something?

A. Yes, an open cut.

Q. What was the other piece of work?

A. Why, we started to cut and we brought the water in from Snowslide Gulch; repaired an old dam there and the ditch [180] they used at one time on the Borean placer and ran it around this cabin, or close to the cabin, and cut a ditch to it, until we got on the Parish and then we cut the roots and sod down to bedrock leading to this open cut, for the purpose of exposing the bedrock.

Q. In that year did you do the assessment work, in 1900? You had the Parish #1 that year too—this work that you have described was done for the benefit of what claim?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial and as calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. Parish #2.

Q. You said something about a dam being up there and some stream that comes down from Snowslide Gulch. Explain to the Court the nature of that dam that was there in 1900.

A. Well, the dam is in a narrow point and there is a ditch cut on the side—this is in Snowslide Gulch itself—and it is a natural dam to a certain extent, and a dam that was built there years and years ago and a portion of the old dam is still there, and every

(Testimony of William M. Ebner.)

year a portion of the snow and rock and snowslides takes off the top and that has to be rebuilt to throw the water into the ditch and divert it.

Q. Which one of the claims is that on?

A. That is on the Parish #1.

Q. What was your object in keeping up the dam?

A. The object in keeping up the dam was to use this water for sluicing and developing these two claims.

Q. What do you mean by sluicing on a quartz claim?

A. Sluicing—that is to wash off the surface and expose the bedrock. [181]

Q. Expose the vein or lode? A. Yes, sir.

Q. Then, the next year, 1901?

A. In 1901 we continued this same work and done practically the same thing. I think in 1901 we completed this ditch across, or very near across, the claim.

Q. The work you did that year—what was the value of it in the way of a benefit to your claim?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial and calling for a conclusion of the witness, and we demand the production of the books of the Ebner Gold Mining Company, showing the amount actually paid.

By the COURT.—The question may be answered but your demand for any books within the control of the witness will be allowed if you specify the books.

Mr. SHACKLEFORD.—The books showing the

(Testimony of William M. Ebner.)

amounts paid out for work on the Parish #2 claim whatever they are,—whether they are in the possession of the witness or in the possession of the plaintiff.

By the COURT.—You may renew that motion later.

Q. What you actually pay out in each of the years 1900 and 1901 for work and labor—for work done on this Parish #2 lode?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial, calling for a conclusion of the witness and not the best evidence, and on the further ground that the length of time over which the witness is now testifying, ten years—the books of the company are patently the best and only evidence that can be relied upon.

Objection overruled. Defendant allowed an exception. [182]

A. The value of the money paid out and the work done there was more than \$100 for that one particular claim.

Q. For each of the years 1900 and 1901?

A. Yes, sir.

Mr. SHACKLEFORD.—We move to strike the last answer on the same ground.

Motion denied. Defendant allowed an exception.

Q. Now, in 1902?

A. In 1902 on the Parish #2 I think we worked most altogether on this ditch and {another ditch higher up; that is the best of my recollection, that we started another ditch higher up and finished the

(Testimony of William M. Ebner.)

first ditch that we started or a crosscut to expose the bedrock across the claim.

Q. In doing this sort of work, from a miner's standpoint, do you wash away the dirt and expose the vein so as to judge of its value and the formation, etc., of the claim? A. Yes, sir.

Mr. SHACKLEFORD.—We object to the question as leading and calling for a conclusion of the witness, and move to strike the answer.

Objection sustained as leading. Question and answer stricken.

Q. You say you have been mining I believe for the last twenty years? A. Yes, sir.

Q. I will ask you as a mining man as to whether or not this work did or did not tend to and did uncover the formation of the ground in the mining claim?

Mr. SHACKLEFORD.—We make the same objection, calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. Yes, sir. [183]

Q. What was your purpose in doing this work?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

Whereupon court adjourned until to-morrow (Wednesday) morning, May 24, 1911, at 10 o'clock.

(Testimony of William M. Ebner.)

Wednesday, May 24, 1911—Morning Session.

Continuation of the direct examination of Mr. WM. M. EBNER.

(By Judge WINN.)

Q. Now, Mr. Ebner, I believe last evening we got down to the year 1902 in regard to the assessment work being performed on the Parish #2 lode claim?

A. Yes, sir.

Q. I disremember whether I asked you the question or not up to that time as to whether for each one of the years the amount of money that had actually been paid out for this assessment work on this lode claim. If I did not, I will now ask you how much was paid out for this assessment work for each one of the years up to 1902, the time you commenced assessment work?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. One hundred dollars, fully—probably a little more than one hundred dollars.

Q. Now, we have got down to the year 1903. I wish you would state, in the year 1903, what was done in regard to assessment work on this claim.

A. In 1903 we continued these ditches, these cross-cut ditches, and the open cut and thoroughly prospected the ground where [184] these ditches had been made the years before.

Mr. SHACKLEFORD.—We move to strike that portion of the witness' answer in which he said he

(Testimony of William M. Ebner.)

thoroughly prospected the ground.

By the COURT.—It will be stricken out. You can state in a detailed way, Mr. Ebner, what work you did—what this work consisted of.

A. Why, it was stripped down to bedrock, so I could get to the bedrock and I took assays to ascertain where the values, if any, existed across this claim. I found that there were values and then I made, that same year, we built a blacksmith-shop and started the approach or what you might say squared up for a tunnel.

Q. This work that you have been doing these years that you have described—I will ask you, Mr. Ebner, what was the purpose of performing this kind of work on this claim?

Mr. SHACKLEFORD.—We object as calling for a conclusion of the witness. Objection overruled. Defendant allowed an exception.

A. In the first place, I found some values when I located the ground. I wanted to ascertain if there was more values and where they were, for the purpose of starting a working tunnel and thoroughly and systematically and in a business-like way develop the claim. That was the purpose of it.

Q. I will ask you if you did start such tunnel?

A. Yes, sir.

Q. What year did you start the tunnel?

A. In the year 1903.

Q. Do you remember approximately upon what portion of the claim you started this tunnel? [185]

A. On Parish #2.

(Testimony of William M. Ebner.)

Q. What portion of the claim?

A. Near the centre of the claim, very near the centre of the claim, I should judge, both in length and width—not quite the centre of the claim in width but near the centre of the claim in length; that is only approximate because I did not measure it.

Q. Have you been over the flume that is constructed across the claim by the defendant company in this case? A. No, sir.

Q. You have not been over that flume?

A. Yes, sir.

Q. You have seen it?

A. I have seen it at a distance; yes, sir.

Q. I have a photograph here—I will state to the Court that I will call Mr. Pond later on to identify it, and I will state to Mr. Shackleford that this photograph was taken the same time the others were taken, some time last fall. I desire to have Mr. Ebner at this time identify this tunnel that he refers to and later on if Mr. Shackleford insists, I will have the photographer called. Mr. Ebner, I will hand you that photograph, which has a flume line across it, and ask you if you can point out to the Court where this tunnel is that you speak of.

A. That is the tunnel, I think, and I located that from this stream of water that comes down here and the trail that shows there on the side of the mountain. The tunnel isn't plain enough so that I can see down to the creek, but I am satisfied that is the tunnel.

(The photograph is marked for Identification Plaintiff's Exhibit "M.") [186]

(Testimony of William M. Ebner.)

Q. Will you indicate by a letter where that flume is? A. You mean the trail?

Q. No, the tunnel. Indicate by a letter on that.

A. It shows in the brush there. It is right there; it is rather indistinct.

Q. Have you described fully what was done there in 1903? A. Yes, sir.

Q. Did you run any part of the tunnel in 1903?

A. We squared up and got, I think, just underground; that is about all.

Q. Did you say you built a blacksmith-shop?

A. Yes, sir.

Q. Where did you build the blacksmith-shop?

A. About 200 feet below, right on the creek—right just above high water.

Q. Well, how did you get in there?

A. We went up the creek, up over the Last Chance placer, and followed up the creek that way. We had a log across the creek right there below Cape Horn.

Q. Did you do any trail building that year to get to the claim?

A. We had to do some—not much, what you would call trail building. It was very steep along the edge of the creek and we did some work.

Q. What did you pay for the assessment work that year?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

(Testimony of William M. Ebner.)

A. One hundred dollars—something more than \$100.

Q. I will ask you if that claim was benefited to the amount of one hundred dollars by the work performed during that year? [187]

Mr. SHACKLEFORD.—We object as calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. Now, we have got down to 1904. What did you do in 1904?

A. In 1904 we done some work in that tunnel, I think about ten feet, in that tunnel and we also done some work in this Borean pit. We turned the water in and got the rocks out of the way and got down to bedrock, I think. We were working to that end.

Q. Where was this blacksmith-shop built—on what claim? A. It was built on Parish #2.

Q. Did you use that blacksmith-shop for anything?

A. Yes, for sharpening tools, for sharpening the drills.

Q. What were you going to do with the drills, use them? A. Yes, driving the tunnel.

Q. And have you explained the work now that was done on the Parish #2 that year? A. Yes, sir.

Q. What did you pay for it?

Mr. SHACKLEFORD.—Same objection.

Objection overruled.

Defendant allowed an exception.

A. Paid something over \$100. I don't remember

(Testimony of William M. Ebner.)

how much it was over \$100.

Q. What was your purpose in running this tunnel?

A. The purpose was to drive that in under the Parish #2, for the purpose of developing the claim and the work in the Borean pit was for the purpose of developing the lode as it was exposed there.

Q. Now, this work that you had been doing prior to 1904,—I [188] will ask you whether or not that was any assistance to you in judging where to locate this working tunnel that you commenced?

A. It was, the ditches and trenches I cut across were. In other words, I wanted to know if there was any values in there and where and what direction to drive, and if there wasn't anything there, there wouldn't be any use in starting a tunnel.

Q. Now, in 1905?

A. In 1905,—I think almost all the work in 1905 was done in this tunnel.

Mr. SHACKLEFORD.—We move to strike the answer of the witness, unless the answer shows that he knows and saw the work done.

Motion granted. Answer stricken.

Q. You were up there on the claim during this year, 1905? A. Yes, sir.

Q. Do you know where the work was done?

A. Yes, it was done in this tunnel and the Borean pit, but principally in the tunnel.

Q. Do you remember or do you not remember the exact number of feet driven in the tunnel that year?

A. No; I don't remember the exact number of feet because it was done by day's work.

(Testimony of William M. Ebner.)

Q. What did you pay for it—the work that was done on that claim that year?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. The amount paid for it?

Q. Yes. [189]

A. One hundred dollars or more.

Q. In 1906 state to the Court what was done.

A. In 1906 we confined our work to the tunnel altogether.

Q. Do you remember the exact number of feet driven that year, Mr. Ebner?

A. I don't remember the exact number of feet that it was driven.

Q. Did you examine the work at the end of the year? A. Yes, sir.

Q. Now, each one of these years up to 1906, did you pay out these amounts on the word of the party who did the work, or did you go and make any examination of the work yourself to determine?

A. The foreman that was working in the mine, he detailed these men to go down there and do this work. I looked after the work to a certain extent and knew that it was going on and about the time that he reported was spent there and the actual money that was paid these men is the way I know how much was spent there; and in 1905 we also built a trail. We found it was difficult to get there, to come up the creek or to come down that way, so we built a trail

(Testimony of William M. Ebner.)

down over the brow of the hill to make it shorter and get down that way.

Q. I will ask you, Mr. Ebner, if you have any of the Ebner Gold Mining Company's books here by which you can refresh your memory and tell the exact amount that was paid for assessment work on these two claims, the Parish #1 and Parish #2, commencing with 1902 up to and inclusive of the year 1906?

A. I can, yes, sir, from the books here. [190]

Q. What is this book I hand you now?

A. This is the ledger of the Ebner Gold Mining Company.

Q. Is that one of the books kept in the regular course of business, in the transaction of the business of the Ebner Gold Mining Company covering the years—so far as this case is concerned, from 1900 to 1906?

A. Yes, sir.

Q. Did you keep the books yourself?

A. No, sir.

Q. You had a bookkeeper? A. Yes, sir.

Q. During this time you were occupying what position with the Ebner Company, all during these years?

A. I was the president and manager.

Q. Do you know as to whether or not those books were kept in the regular way of keeping books for a concern of that kind?

A. Yes, sir, they were.

Q. Did you have any supervision over the keeping of the books yourself?

A. Well, I had, to a certain extent; yes.

(Testimony of William M. Ebner.)

Q. Now, I will ask you to turn to that page of this ledger and ask you if you can refresh your memory from the matters contained there, and state to the Court the exact amount of money that was paid out for the benefit of these two claims in performing the annual assessment work covering the years from 1900 to 1906, inclusive, of both years?

Mr. SHACKLEFORD.—We object to the use of the book because it is not an original memorandum made by the witness, because it is and appears to be a ledger, a book of secondary nature; as the witness has not made the memoranda himself, he cannot testify to it. [191]

(Question withdrawn.)

Q. Who kept your books and where is he, if you know?

A. Mr. Denby kept my books,—he is one of them.

Q. Do you know where Mr. Denby is now?

A. I do not.

Q. Do you know whether or not he lives in Alaska?

A. I don't think he does—no, he does not.

Q. What was your system of keeping these books and making these entries in your ledger during this time, the periods I have asked you about, that is, how was the ledger made up, what was the whole system of your bookkeeping up there?

A. Why, it was a double-entry system.

Q. This book is not the book of original entry—did you have any other books that were kept in connection with your business up there besides the ledger and journal we have here?

(Testimony of William M. Ebner.)

A. Yes, we had the time-book.

Q. Just state briefly what the time-book consisted of. What matter did that contain?

A. The time-book contains the men's time, each man separate. And they were kept in such a manner that it would show what work he done from day to day, each day, and what work he was working on.

Q. And would you transfer the entry from that book to any other book or books kept by the company?

A. From that, of course, we made up our pay-roll and then the pay-roll sometimes was copied—we adopted a system—at first we didn't, but after that we copied the pay-roll into the journal.

Q. Have you the journal here that was kept?

A. Yes, sir.

Q. Showing these items? [192] A. Yes, sir.

Q. There are two of them, I believe. Now, did these pay-rolls or time-books that you have here, that you have described to the Court, did they furnish you any basis of making the entries in your journal and ledger? A. Yes, sir.

Q. Well, what about that?

A. The time-book furnished the basis for making the entries on the pay-roll and the pay-roll for making the entries in the journal, as far as the labor was concerned; that is the way we got at the labor.

Q. Do you know what became of those time-books that had the original entry upon it and the pay-roll—are they in your possession?

A. No, they are not.

(Testimony of William M. Ebner.)

Q. What became of the time-books?

A. I don't know, those old time-books. I might find some of the later time-books but it is a long time since we operated—I don't know where they are.

Q. Are they here in town?

A. I don't know where they are. I have looked for them; in fact, I haven't looked for them, but I know they are not in existence, not all of them,—not the old time-books.

Q. Now, these journals that you have here and the ledger you have, were they kept in the regular transaction of your business up there, of the Ebner Gold Mining Company? A. Yes, sir.

Q. Now, I ask that you turn to those journals you have here and if you can identify any of the entries that appear in the ledger there, made from the journal, I wish you would do so. [193]

A. Everything that is in the ledger is in the journal.

Q. It is made in the journal in the same manner that it is kept in the ledger here, or do you have more items in your journal?

A. Well, it is more itemized there,—that is, some of it is; a good deal of it is, yes.

Q. Looking at your ledger account here—look at it and see—is there a method by which you can determine just where those entries are made in the journals? A. Yes, the pages are on here.

Q. Are the entries made in the ledger all found in these journals? A. Yes, sir.

Q. And found at the respective pages that are re-

(Testimony of William M. Ebner.)

ferred to in the ledger account? A. Yes, sir.

Q. You have gone over these entries, have you, in the journal, to see that they are correctly transferred—those entries in the journals, to see that they are correctly transferred to the ledger—have you examined them for that purpose?

A. Not lately; I did at the time they were made, years back I have.

Judge WINN.—Now I ask that the witness be allowed to refresh his memory from all these books and the ledger account, and I have them open here for examination by counsel on the other side—that he be permitted to state the amount of money paid out for assessment work done on these two claims for the years commencing with 1900 up to 1906, both years inclusive.

Mr. SHACKLEFORD.—To which we object because the books are not books of original entry; they are books of secondary nature [194] not kept by the witness and not identified by any one keeping the books.

(By the COURT.)

Q. You say you know nothing about where the original entry is? A. That is in the time-books?

Q. Yes.

A. The original entries are all in these journals, but these entries were taken from the time-books; that is, for instance, the time-book pertained to the labor—the foreman had charge of the men; he knew where his men were working every day; he had a certain department where he kept that himself; he

(Testimony of William M. Ebner.)

made a certain notation on the time-book where he was working and if he worked in the Parish, he would put a mark over that day and at the end of the month he would report and then the charge would be made.

Q. You say you know nothing about where these time-books are? A. No.

Q. You spoke of the pay-roll being made up from those time-books. Where are the pay-rolls? Was the journal made up from the time-book?

A. No, the journal was made up from the pay-roll, that is, as far as the labor was concerned.

Q. What became of the pay-roll?

A. Well, I don't really know; probably some of them exist yet. I haven't looked for those.

By the COURT.—I think the question is objectionable as far as refreshing his memory from the books is concerned.

Q. Now, from the identification we have made of these books, I will ask you, Mr. Ebner, what page of this ledger contains the account that you have just described, showing the [195] amounts of money you say were paid out during these years for this assessment work?

A. Page 99 of the ledger.

Q. And as I understand it, the entries in the ledger show the pages that these entries are found in those two other books that you term your journals?

A. Yes, sir.

Judge WINN.—Now, we offer that account and that page as the entry showing the amount of money paid out for the benefit of these two claims, cover-

(Testimony of William M. Ebner.)

ing the period of time we have just mentioned, for these years, and also we offer such pages of the journals in evidence as are referred to in this ledger account.

Mr. SHACKLEFORD.—To which we object, for the reason that the books have not been properly identified and the entries therein have not been testified to by anyone, and for the reason that the same are not books of original entry but are secondary books, and for the further reason that the loss of the original books has not been properly shown to lay a basis for the introduction of the books. Mr. Ebner himself says that the pay-rolls may be there.

Judge WINN.—If there is any question about that at the present time, I will have Mr. Ebner make a search for any other books he has testified to in the records and files and will offer them this afternoon.

Q. (By the COURT.) Did you have the same bookkeeper during all this time?

A. No, sir, several bookkeepers—there was a man named Denby and a man named Hart.

Q. During this period you have been asked about regarding these [196] books did you frequently find mistakes made by these men or were the books kept—did you find them reliable?

A. I found them, generally, reliable. I found some mistakes, but nothing more than would occur probably by any other book-keeper.

By the COURT.—You will be required to prove a thorough search for the books of original entry.

Q. I believe you covered the year 1906?

(Testimony of William M. Ebner.)

A. Yes, sir.

Q. Now, I will ask you if you had anything to do with the assessment work for the year 1907?

A. I did.

Q. State to the Court what was done during the year 1907.

A. During the year 1907, I had a man working up there as watchman named Oscar Harri and during the summer,—in fact, in the spring, as soon as the snow was off, I directed him to work on this Parish #2, and he turned the water in and worked in this Borean pit, not altogether, but most of his work was there, and towards fall we hired another man to help him, a man named John Sawney. I think, if I recollect right, I paid him something like \$66 for working there, besides the labor that was performed by this man Oscar Harri.

Q. Well, for the benefit of this claim, how much did you pay out in 1907 in labor?

Mr. SHACKLEFORD.—We move to strike out of that last answer what he told the man to do and what he paid them, there being no evidence upon which to base any valuation because the character of the work is not described.

Motion denied. Defendant allowed an exception.

Q. I will repeat that last question. For the benefit of [197] this claim how much did you pay out in 1907 in labor? A. Something over \$100.

Q. I don't believe you described just the nature of the work that was done. I wish you would do that.

A. The nature of the work was to expose the bed-

(Testimony of William M. Ebner.)

rock in this Borean pit, turn the water in there and wash that and expose the bedrock. It was to get on to the bedrock and expose it and prospect it and determine as to the width of the vein there.

Q. What did you do there in 1908?

A. In 1908 this same man was watchman there.

Q. Oscar Harri?

A. Oscar Harri; and I set him to work and told him what to do, and he done most of his work in the same pit. Towards fall I hired another man by the name of—I looked over the amount of work he had done—

Q. Who had done?

A. This man Oscar Harri, and ascertained the number of days he had worked there in actual labor, and to make up what I thought was not sufficient labor, not sufficient work, I hired a man, John Perelle, to go up there and do the work in this same pit, and drive an open cut along the trend of the ledge.

Q. You don't know whether or not anybody worked with John Perelle while he was at work up there,—whether anybody assisted him?

A. I told him to get a man but I don't know who the man was. I left soon after that.

Q. Do you know how many days' work John Perelle claimed,—for how many days you paid him?
[198]

Mr. SHACKLEFORD.—We object to that—what he claimed.

Q. How many days' work did you pay them for—each of them?

(Testimony of William M. Ebner.)

Mr. SHACKLEFORD.—We object. The question is how many days' work they did.

Judge WINN.—We will undoubtedly prove it by both of the witnesses—one is in the courtroom, the other is subpoenaed.

Objection overruled. Defendant allowed an exception.

A. I hired this John Perelle to go there and take another man and do ten days' work each.

Q. How many days did you pay for each?

A. For those ten days' work I was to pay him \$55, and I think they were to furnish some powder.

Mr. SHACKLEFORD.—We move to strike the latter part of the answer as to what he thinks they were to furnish.

Motion granted.

Q. You know you paid them for ten days' work each there?

A. Yes, I know I paid them \$55, which would bring the assessment work up on that claim to \$105. I am positive of that.

Mr. SHACKLEFORD.—We move to strike the answer of the witness after the words "\$55," as stating a conclusion and being argumentative.

Motion denied. Defendant allowed an exception.

Q. Now, Mr. Ebner, I asked you up to a certain time, I believe 1906, as to whether or not you took the work of these parties who performed labor there or whether you examined the work at the end of each year to ascertain whether or not there had been what you thought to be a sufficient amount of work

(Testimony of William M. Ebner.)

done. Now, for these last years I have questioned you about, 1907-1906, 1907 and 1908—I will ask you if you made any examination of the work at the end of each year [199] to ascertain what had been done.

A. I did, every year and more particularly in 1907. I was very particular in 1907, and I went over the work very carefully, and I asked this man Oscar, "How many days did you work there?" and he said, "I put in so many days' work." I knew just how much he was getting—we paid him so much and his board and that amounted to approximately so much and I put it down low enough, put it in at \$2.25 a day, I think, what he did there, and that not being sufficient, I hired this man, this man John Perelle, to make up the difference.

Q. Who performed the assessment work in 1909 up there?

The COURT.—The witness has just been testifying as to 1907?

Judge WINN.—1908—the last was about 1907, as I understood it.

The WITNESS.—My answer was as to 1907, yes, but we have taken in 1908. It was in 1908 that John Perelle and his partner done the \$55 worth of work.

Q. That was the year 1908 you had John Perelle and the other fellow to do ten days' work each?

A. Yes.

Q. And you have already testified as to what Oscar Harri did that year of 1908?

A. Yes, sir.

(Testimony of William M. Ebner.)

Q. Now, I will ask you who did the assessment work for 1909?

A. In 1909 Mr. Tripp done the assessment work. I gave him permission to do the assessment work, authorized him to do it.

Mr. SHACKLEFORD.—We object, and move to strike the answer of the witness as stating a conclusion. If he wants to state any conversations with Mr. Tripp or the relations Mr. Tripp had to the work, it is different, but it seems to me it is improper on direct examination to say he gave him permission [200] to do so.

By the COURT.—State the conversation, if you remember it, or the correspondence or whatever manner Tripp was employed by you or directed by you.

Judge WINN.—I expect Mr. Tripp has the letters written him, and I expect to introduce that letter, written by Mr. Ebner—this is simply preliminary. I am simply asking if he did have anybody do the assessment work or gave anybody permission to do it. I will follow it up by Mr. Tripp with the letter later on.

By the COURT.—The objection will be sustained. The answer that he gave him permission, would not be employing him or give him authority to do the work on the part of the company.

Judge WINN.—We will ask an exception—we will introduce the letter later on.

Plaintiff allowed an exception.

Q. I will ask you if there was any assessment work done up there in 1909 under your supervision, that

(Testimony of William M. Ebner.)

Mr. Harri or any one else did?

A. Yes, there was.

Q. Mr. Harri is here to testify to that?

A. Yes.

Q. And the remaining part of the assessment work you did not do yourself for that year 1909?

A. No, sir.

Q. Do you know under whom, or who did perform the assessment work that year? A. Mr. Tripp.

Q. Now, I will ask you if over these years you have testified concerning and while you were engaged in the mining business, as you say, as president of the Ebner Gold Mining Co., as manager, [201] I will ask you if you ever had any dealings with the Alaska-Juneau Gold Mining Company in the way of business affairs during those years, that is, did the Ebner Gold Mining Company have any, through you?

Mr. HELLENTHAL.—We object to that.

Judge WINN.—This is for the purpose—whether admissible or not, I will submit it to the Court—of showing that right through all these years this corporation was doing business as a corporation and prosecuting business in Alaska, and it was also transacting business with the defendant company, and it does not lie in the mouth of this defendant to deny the capacity of this corporation.

Mr. HELLENTHAL.—If that is the purpose of it, we will make our objection more specific. If it is to prove the *de facto* existence of this corporation, it is inadmissible, for the reason that there was not at that time, or at the time of the pretended incor-

(Testimony of William M. Ebner.)

poration, an existing law under which the corporation could be organized and no *de facto* corporation can exist, regardless of the dealings of the corporation or regardless of the recognition of the corporation or regardless of any act that may be done by the intended incorporators unless there is a valid, existing law under which the corporation could have been organized had the proper steps been taken.

By the COURT.—There was some law that corporations could be organized under and do business in Alaska?

Mr. HELLENTHAL.—Our contention is that there was no law under which the corporation could be organized in the District of Alaska. The law under which this corporation attempted to incorporate was the law in force in the State of Oregon [202] which was made the law of Alaska as far as applicable. Our contention is that it was never made the law of Alaska because not applicable to the conditions of Alaska, and there being no law under which a *de jure* corporation could be organized, there could be no *de facto* corporation—there can be no corporation by estoppel.

Mr. SHACKLEFORD.—And the further objection to it that the fact that it is competent under this ruling to show that it was a *de facto* corporation—the fact that they had business with parties from time to time in a casual way in which the party was not called upon to look up the question or inquire into the legal capacity of the plaintiff to sue in reference to transactions, unless they refer to this

(Testimony of William M. Ebner.)

particular property in controversy, could not prevent us from raising the question in this suit, and I apprehend that Judge Winn does not make any claim that there was any transaction between the parties concerning the property in controversy.

After argument the objection was by the Court overruled. To which ruling defendant is allowed an exception.

Q. Go ahead, Mr. Ebner.

A. That is about all the business we had, when the right to a patent to the Colorado lode claim arose and the Ebner Gold Mining Co. adversed them. The Ebner Gold Mining Co. brought an adverse suit in this court.

Mr. HELLENTHAL.—We object as not responsive, and we object because the testimony is not the best evidence.

By the COURT.—It is not the best evidence. The objection will be sustained.

Judge WINN.—That is all, Mr. Ebner, at this time. [203]

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. When you discovered the Parish lode claim, I understand you want the Court to understand that you located the discovery stakes at the point of discovery? A. Yes, sir.

Q. And you put on that stake, in a tin can, a copy of the notice of location? A. Yes, sir.

Q. On the day of discovery?

(Testimony of William M. Ebner.)

A. Yes, about that time—probably a day or two afterwards.

Q. What time was it with reference to the discovery?

A. I think it was—I made this discovery about two days before the location was made.

Q. Before the location? A. Yes.

Q. And you didn't post any notice when you made your discovery?

A. Not the same day that I made the discovery.

Q. Where are the assay certificates of that rock?

A. I don't remember. I don't think there were any assay certificates—I don't remember.

Q. Don't you know whether they made any assays of that rock? A. Yes, they made assays.

Q. You stated in your direct examination that you made assays before you staked your claim?

A. I made assays and took the rock and took a mortar and pounded it out and got colors besides.

Q. But on your direct examination you said you got specific assays from your discovery of the rock, before you staked your claim, didn't you?

A. Yes, sir. [204]

Q. And you say that now? A. Yes, sir.

Q. Was that before you put in your discovery stakes, your notice? A. Yes, sir.

Q. Who assayed the rock?

A. I think it was assayed by my own assayer—I am not sure, though.

Q. Who was your assayer at that time?

A. I think that John Roth did the assaying then?

(Testimony of William M. Ebner.)

Q. That was in what year? A. 1899.

Q. And the property was staked without the aid of a surveyor?

A. Yes, without the aid of a surveyor.

Q. Staked by using a wire for measurement?

A. We had a hundred foot tape and for the purpose of stretching across the creek and these wide gulches, we used a wire and laid it out in 100 foot lengths and 50 foot lengths—100 foot lengths, I think, for the purpose of getting near the creek measurement without going up and down, not having an instrument.

Q. And subsequently you had the claim surveyed, when was that—1908? A. 1908; yes, sir.

Q. As far as you know, that is the first time that Mr. Hill went on the ground?

A. As far as I know, that is the first time that he done any work—he might have been on the ground before.

Q. Your original location with wires and tape was so near accurate that you—the posts were all checked and it was so nearly correct, only three or four feet off— [205]

A. I think about six feet off.

Q. And that is the corner over toward the Colorado? A. Yes.

Q. When did I understand you to say in your direct examination the survey on the Forrest was made?

A. The first official survey on the Forrest was made in 95, that is the first official survey that was

(Testimony of William M. Ebner.)

made, and the then patent was delayed—the people who were associated with me failing to put up the money, it was delayed and delayed until we had to make a resurvey and had to go over the same thing again in the surveyor general's office in making the application.

Q. This is the state that you found on the Forrest in 93 (referring to photograph)?

A. No, that is not on the Forrest. That stake was there in 93—I won't be sure that this stake (indicating)—from the photograph that looks—the stake that was there in 93 was a 2x4, and this tree here, these surrounding trees, more particularly this tree and that tree, I remember that.

Q. You testified yesterday in your direct examination you remembered seeing that stake there, didn't you?

A. I wasn't sure yesterday. I said it looked like it.

Mr. SHACKLEFORD.—I have been *exhibited* to the witness exhibit "K."

Q. So you didn't make that statement yesterday in your direct examination that this was the stake?

A. If I did, I didn't mean to. I know the surroundings there. I know the stake is in the exact location but whether that is the same stake, I wouldn't be positive about that.

Q. And that was in the year 93? [206]

A. Well, the first time I saw that was in 1892—the first time I saw that, I think, was that year, in 1893, yes—I wouldn't be positive whether I testified

(Testimony of William M. Ebner.)

it was 1893 or not.

Q. What is that, the southwest corner of the Lotta?

A. No, I call that the northwest of the Lotta.

Q. Did you see the southwest corner at the same time?

A. Yes, I saw the southwest corner back in 1893.

Q. The southwest corner of the Lotta. Then, you were mistaken last year when you made an affidavit in this court, sworn to in the State of California and County of Los Angeles, that you first saw it in 1894?

A. Well, if I said 1894 the first time, that is wrong. I saw it in 1894, but that wasn't the first time. You have reference now to the southwest corner of the Lotta?

Q. Yes, the southwest corner of the Lotta. Your statement in your affidavit, then, was to the following effect, that the first time you saw this corner was in 1894 and the last time in the summer of 1909—so far as its being the first time you saw that corner is incorrect?

A. That part is incorrect, that I saw it the first time in 1894. I saw it in 1894, but the first time I saw it was in 1893.

Q. I understand from you that you set men to work on this assessment work and when you were notified of their daily wages, that it had equalled the sum of \$100 for the year's work, that the work ended?

A. Yes, sir, fully one hundred dollars, yes, sir.

Q. They had a certain daily rate of pay?

(Testimony of William M. Ebner.)

A. Yes, sir.

Q. And they were set to work and when that pay reached the sum of one hundred dollars, the work ended? A. Yes, sir. [207]

Q. Now, I wish you would take the plat that has been introduced in evidence here and mark on the ground approximately the position of the work on the ground with reference to its distance from the various corners of the Lotta as claimed by you—there are two places where the work was done, one in the Borean pit and the other in the tunnel?

A. And the ditches and crosscuts; yes, sir.

Q. The ditches were part of the work in the Borean pit? A. No, not in the Borean pit, no.

Q. Just show the Court where the ditches were.

A. This Parish claim comes out here about 125 feet according to measurement.

Q. From Corner #5 of the Lotta extended?

A. Yes, sir; and comes in here, and the Borean pit is in here.

Q. On the boundary line?

A. On the boundary line, yes, sir, and the creek comes down along in here somewhere.

Q. You don't intend to say that the creek runs through or anywhere near the southwest corner of the Parish?

A. No, it comes probably about like that and then turns off like this. Now, that is wrong getting it up there, but this is on a small scale and it would not go down very far there. We brought the water in over like this.

(Testimony of William M. Ebner.)

Q. Mark the Borean Pit "A"?

A. That is the Borean pit right there.

Q. Mark it there. (Witness does so.)

The WITNESS.—(Continuing.) We brought the water in here and started to crosscut in these ditches here, and we came along here and cut another one like that and came a little further and cut another one like that—that is alongside of the creek [208] here. Here is where there was an open cut for a distance of about twenty-five feet.

Q. Did you cut that? A. Yes, sir.

Q. When was that cut?

A. That was cut during the different years. I think we started some of the work in 1899, not very much, but for the purpose of prospecting the claim and this open cut I spoke of is there. The tunnel is almost below that, below that open cut down by the creek, above high-water mark, and the Borean pit is there and the tunnel comes down below.

Q. Are these ditches open ditches on the ground?

A. We had to cut the roots and sod and get down to the bedrock.

Q. How much of the underground work is there on the Parish lode?

A. I think that tunnel there is twenty-odd feet. I don't remember just how much, but it was over twenty feet the last measurement I made there.

Q. Where did you do your work on the Parish #1?

Judge WINN.—I object to that—the Parish #1 lode is not in litigation. The question is incompe-

(Testimony of William M. Ebner.)

tent, irrelevant and immaterial for any purpose whatever in this case.

Objection overruled. Plaintiff allowed an exception.

A. The work on the Parish #1 was on the south side of the Borean pit and above the Borean pit and in Snowslide Gulch.

Q. The Borean pit lies along the boundary line of the Parish #1 and Parish #2?

A. Most of it is on the Parish #1.

Q. And the mountain is on an incline there and the Parish #1 stands on the mountain above the Parish #2, up the hill? [209]

A. Yes, there was a difference in elevation,—not a great deal.

Q. They are end to end claims, running up the hill?

A. Yes, when you pass Snowslide Gulch, it is very steep; yes.

Q. It don't make any difference whether you pass Snowslide Gulch or not, all the way up the creek up there the Parish #1 is the upper one of the two?

A. Yes, sir, it is the upper—it is higher; it is the higher of the two.

Q. How many feet of underground work did you say there was?

A. The last time I measured it, I think there was something over 20 feet, some twenty-odd feet, but I don't remember the exact number of feet.

Q. It was all on #2?

A. Yes, it was all on #2.

Q. Is there any underground work on #1?

(Testimony of William M. Ebner.)

A. Yes, sir.

Q. What is that?

A. That is in Snowslide Gulch?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

Q. This claim was located as a quartz claim?

A. Yes, sir.

Q. Do you know where the ditch work, the work of running the water as you claim it, over the ground, took place, with reference to the position of the present Alaska-Juneau flume?

A. The Alaska-Juneau flume is way down in the canyon, way down away from all this. This is up on the mesa, or up on the flat? [210]

Q. That is the Borean work?

A. And the other ditches, all of the other ditches.

Q. The ditches were used, as I understand it, to bring water down to wash off below?

A. No, to wash off on the flat, above the creek—there is quite a steep bank where that flume is.

Q. Where is the open cut—right against the creek according to this plat, is it not? A. Yes, sir.

Q. Mark that “B.” (Witness does so.)

Q. Where is the open cut with reference to that tunnel in Plaintiff’s Exhibit “M” for identification?

A. You go up a little to the right and where the springs come out here,—this doesn’t show the detail. There is some lumber lays there and some quartz piled up right there, but it is a little to the right I think,—

(Testimony of William M. Ebner.)

right close to where that water comes up.

Q. Mark that "C" with your pen on that photograph. (Witness does so.)

Q. When did the Ebner Gold Mining Company go out of possession of the property in controversy,—when did the Ebner Gold Mining Company turn over the possession of the property in controversy to the California & Nevada Copper Company?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

Overruled. Plaintiff allowed an exception.

A. You mean the possession of the property?

Q. Yes.

Judge WINN.—We object as calling for a conclusion of the witness. It calls for a legal conclusion and which is the bone of contention in this case.

* * * [211]

Objection overruled. Plaintiff allowed an exception.

A. I never turned over possession, the way I understand it. I am the President of the Ebner Gold Mining Company and I never turned over the possession—I told you that.

Q. Are you still one of the owners claiming the property? A. Yes, sir.

Q. You are a creditor of the California & Nevada Copper yet?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained. Defendant allowed an exception.

(Testimony of William M. Ebner.)

Q. You have an interest in the result of this suit?

A. I might have.

Q. You have not been fully paid for your stock in the Ebner Company by the California & Nevada?

Judge WINN.—We object as incompetent, irrelevant and immaterial, and so far as we are concerned, we will admit that the witness has an interest in the suit.

By the COURT.—The objection will be sustained. The witness himself has admitted he has an interest, a contingent interest. Defendant allowed an exception.

Q. When did you go out of the possession of the property yourself—as an officer of the Ebner Company?

Judge WINN.—Same objection—incompetent, irrelevant and immaterial and as calling for a legal conclusion of the witness.

Objection overruled. Plaintiff allowed an exception.

A. When did I go out of the possession?

Q. Yes.

A. I don't consider I ever went out of the possession.

Q. You went away and left Mr. Tripp in charge here? A. Yes, sir. [212]

Q. He is not an employee of the Ebner Company, is he? A. No, sir.

Q. Did you leave anyone here representing the Ebner Company?

A. I did for a long time; yes, sir.

(Testimony of William M. Ebner.)

Q. Is there anybody here now representing the Ebner Company except yourself? A. No, sir.

Q. Was there anybody here last fall representing the Ebner Company except yourself?

Judge WINN.—We object as calling for a conclusion of the witness. If he wants to know the facts about how Mr. Tripp was up there, he should inquire about it. He is trying to get the witness to admit himself out of the possession of the property and I say the reason that that is one of the contentions here and their main contention, I do not believe he should be permitted to ask the witness those questions in that form.

Objection overruled. Plaintiff allowed an exception.

Q. Is there anybody else besides yourself here?

A. Not that I know of.

Q. You changed your residence about eight months ago and moved to Hollywood, California, I understood you to say? A. Yes, sir.

Mr. SHACKLEFORD.—That is all.

Redirect Examination.

(By Judge WINN.)

Q. Now, about this question of possession. I will ask you to just explain to the Court how Mr. Tripp and those people were on that property and under whose permission they went on to the property and for whom this assessment work was being done—go ahead and explain it fully. [213]

Mr. SHACKLEFORD.—We object to the ques-

(Testimony of William M. Ebner.)

tion for the reason that it calls for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. Why, I don't know just how—

By the COURT.—Read the question, Mr. Reporter.
(Question read.)

A. Why, Mr. Tripp represents the parties who are buying, purchasing, this Ebner property and who have the property under option, and in that way I gave Mr. Tripp, as their representative, permission to go on there and do certain things,—that is, to develop any work they wanted to do and do the assessment work.

Mr. HELLENTHAL.—We object as not the best evidence.

Mr. SHACKLEFORD.—The witness is not referring to any conversations, letters or communications with anybody. He is simply making an address on what was done and that is the reason I objected to the question originally.

Q. Anything further? A. That explains it.

Mr. SHACKLEFORD.—We move to strike the testimony of the witness because it does not refer to any conversations, communications or acts between parties. Simply gives his construction of it.

Judge WINN.—We resist the motion.

By the COURT.—The objection will be sustained in this form. You said you were going to introduce letters, etc.

Plaintiff allowed an exception.

(Testimony of William M. Ebner.)

Q. I will ask you if you have had any conversation with anyone about permitting anyone to go on this property, and if so, with whom? [214]

A. I had a conversation with one F. L. Underwood, who has an option to purchase this property and he told me that Mr. Tripp—

Mr. SHACKLEFORD.—We object to what Mr. Underwood told him and I desire to ask the witness a few questions.

By the COURT.—Very well.

(By Mr. SHACKLEFORD.)

Q. Your transactions with Mr. Underwood with reference to the title to this property are in writing, are they not? A. Yes, sir.

Q. These matters have been carefully gone over by counsel and you have got all of the important transactions between you in writing, haven't you?

A. Yes, sir.

Q. (By the COURT.) The matter about which you are starting to explain, has that been in *any included* in these writings? A. No, sir.

By the COURT.—The objection will be overruled. The whole conversation may go in.

Defendant allowed an exception to the ruling.

A. Why, Mr. Underwood told me that Mr. Tripp was his representative here, to do whatever they saw fit on the property, and that Mr. Tripp would do the assessment work, so I gave Mr. Tripp permission to go on and do the assessment work for 1909.

Q. Is that all the conversation you had with Mr. Underwood about Mr. Tripp going on there?

(Testimony of William M. Ebner.)

A. In a condensed form—that is the sum and substance of it.

Q. Did you ever have any conversation with Mr. Tripp about his going on there and doing the assessment work?

A. Yes, in 1909, I had a talk with Mr. Tripp. He said he would [215] go on and do the assessment work and see Oscar Harri and see how much more was required, outside of what he had done and see that the assessment work was done for 1909.

Judge WINN.—I think that is all now. I will desire to recall Mr. Ebner further on.

Recross-examination.

(By Mr. SHACKLEFORD.)

Q. Is it a fact that the full purchase price from the California & Nevada Company to the Ebner Gold Mining Company has been paid—the full purchase price due from the California & Nevada to the Ebner people has been paid?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

By the COURT.—It might be important to determine whether this is a moot case or not. If you are undertaking to say that this is simply a moot case and the Ebner people have no further interest in this property, it may be shown, if you can show it.

Q. I ask you if the purchase price of the Ebner property has not been fully paid by the California & Nevada Company?

(Testimony of William M. Ebner.)

Judge WINN.—We object as incompetent, irrelevant and immaterial, and as not the best evidence and not proper recross-examination.

Objection overruled. To which ruling plaintiff is allowed an exception.

A. I don't know anything about the California & Nevada Copper Company, but the full purchase price, the contract made with Mr. Underwood, has not been paid.

Q. You have had no transactions with the California & Nevada Copper Company? [216]

A. No, sir.

Q. You have been aware have you not that for the past two years the California & Nevada Copper Company has been selling bonds and Mr. Underwood, too, with the representation that they were the owners of the Ebner property?

A. I don't know anything about that.

Judge WINN.—I object to that as incompetent, irrelevant and immaterial. We are not standing here as sponsor for the morals of any corporation seeking to do business that we are not connected with, etc.

By the COURT.—The question is answered.

Objection overruled.

Plaintiff allowed an exception.

Mr. SHACKLEFORD.—That is all.

Witness excused. [217]

[Testimony of Lloyd G. Hill, for Plaintiff.]

LLOYD G. HILL, called and sworn as a witness in behalf of the plaintiff, testified as follows:

(Testimony of Lloyd G. Hill.)

Direct Examination.

(By Judge WINN.)

Q. What is your business? A. Surveyor.

Q. How long have you lived in Alaska?

A. I have lived in Alaska nearly thirteen years.

Q. You were formerly associated with George W. Garside during his lifetime in the surveying business here in Juneau? A. I was.

Q. The firm name was what?

A. Garside & Hill.

Q. Is Mr. Garside living now?

A. He is dead.

Q. That is George W. Garside?

A. George W. Garside.

Q. Now, when did you first come to Alaska?

A. I came to Alaska in the spring of 1898.

Q. With whom did you become associated in business, if with anyone?

A. Well, I was not associated in business at that time, I merely acted as an assistant, chain-man, and also in the office with my brother-in-law Garside.

Q. Did he hold any position as a surveyor in Alaska?

A. At that time, yes, sir,—he was United States deputy surveyor.

Q. In 1895, did you say?

A. In 1898, the spring of 1898.

Q. I will ask you if you are acquainted with what is commonly referred to as the Ebner property, up Gold Creek from Juneau? [218] A. I am.

Q. When did you first become acquainted with any

(Testimony of Lloyd G. Hill.)

of that property? A. About in May, 1898.

Q. Some time in May, 1898? A. Yes, sir.

Q. Did you go in and upon any of the property at that time? A. I did.

Q. With whom? A. With Mr. Garside.

Q. What did you go up there for?

A. We went up to survey the southwest side line of the Lotta claim, survey #87.

Q. What year was that? A. 1898.

Q. Now, I will ask you if you have been more or less familiar with that property ever since that time?

A. Yes, sir, I have.

Q. I will hand you a plat and ask you to look at it and ask you if you had anything to do with the drawing and the making of that plat.

A. I did, yes, sir.

Q. I will ask you if you are acquainted with the different mining claims and the objects, etc., that are placed upon this map, that is, by going over it, in and upon the ground and making surveys and running lines?

A. Yes, I am acquainted with practically all of it as shown on this plat.

Q. I will ask you if the platting, etc., on this map was done by you or under your supervision?

A. Yes, it was. [219]

Q. The mining claims and natural objects that are on there—I will ask you if they are correctly put on there from an actual running of the lines and also data and information you gathered from the surveyor-general's office, etc.?

(Testimony of Lloyd G. Hill.)

A. Yes, sir, they were—that is the way it was put on.

Q. Now, Mr. Hill, you say you first went on this property that is in controversy in 1898—I will ask you to refer to this map and plat that you have made and state to the Court what boundary line of the Lotta claim you referred to a while ago that you had something to do with in 1898. What line of the Lotta claim was it?

A. I ran the southwest side line of the Lotta claim or the line 5-6, between stakes #5 and #6,—that is, I assisted in running it.

Q. Have you ever run over the exterior boundary lines of the other claims that are on this map or to what extent have you? Explain shortly to the Court.

A. I practically ran over the northeast end lines of the entire Ebner group and also some of the south-east end lines.

By the COURT.—That would be the northeast end line or the northwest end line?

A. The northwest end lines.

(The plat is marked for Identification, Plaintiff's Exhibit "N.")

* * * * *

Q. That was in 1899, when you were over this claim again so that you observed anything about the monuments on it?

A. I was over that claim again when I made an official survey of the Idaho placer and Colorado lode.

Q. (By the COURT.) When would that be?

A. That would be in 1904, I think. [220]

(Testimony of Lloyd G. Hill.)

Q. It is marked on this map 1904, Colorado lode survey 641, 1904? A. Yes, sir.

Q. I will ask you at any of these trips up to the present time had you seen anything of any other stakes that afterwards were claimed by Mr. Ebner to be the stakes of the Parish #2 or the Parish #1 lode claim?

A. The first time I saw any of the Paris stakes was in—I saw the stakes in 1899, I think—there was some small stakes there and I didn't know what they were, the marking had sorter disappeared from them and I didn't know just what they represented.

Q. Then, when you went on to make the survey of the Colorado in 1904, did you see any of the stakes of the Parish #2 or the Parish #1?

A. Yes, I did. I saw the common end line between the Parish #1 and #2 at the time of the official survey of the Colorado claim.

Q. What is the common end line represented on this map and plat by? Will you name it?

A. The common end line would be the southeast end line of the Parish #2 and the northwest end line of the Parish #1.

Q. Between what two numbers?

A. It is between #3 and #4—it is line 3-4 of the Parish #2.

Q. Did you see any of the Lotta stakes then, in 1904?

(Testimony of Lloyd G. Hill.)

* *sir, they were my initial starting point again.
make the survey of what?
make the survey of the Colorado*

at stakes of the Lotta claim did you find on the
[221]

A. In 1904 I found post #5 of the Lotta and post #6 of the Lotta.

Q. Where were the posts then with respect to where they were when you had seen them before?

A. Same position, same place.

Q. That is in 1904? A. Yes, sir.

Q. You and Garside made the official survey for the Colorado lode claim?

A. Yes, sir, we assisted in that.

Q. Now, Mr. Hill, did you have anything to do with the survey of what is termed on here Forrest lode claim survey 545, made in 1900?

A. Yes, sir, I assisted George W. Garside on that survey.

Q. You were up on the ground with him?

A. Yes, sir.

Q. In making the survey of the Forrest lode claim, to whom did that claim belong and for whom were you making that survey?

A. The Forrest lode claim with others belonged to William M. Ebner and T. C. Scott.

Q. It belongs to what is called—

A. The Dora Gold Mining Company.

Q. I will hand you this tracing, the certified copy of plat, and I will ask you if you had anything to

*Omitted words do not appear in original Certified Transcript of Record.

(Testimony of Lloyd G. Hill.)

do with the surveys indicated on this?

A. Yes, sir.

Mr. HELLENTHAL.—These are the Forrest surveys?

Judge WINN.—Yes, I am going to identify them.

Q. You say you did?

A. I assisted on that entire survey?

Q. You assisted on that entire survey?

A. Yes, sir. [222]

Q. On all the claims represented on that plat?

A. All the surveys included in Survey #545—that is, the Dora group.

Q. Does that have the Forrest as one of the claims in it?

A. Yes, sir, the Forrest is one of the claims.

Judge WINN.—We now offer in evidence a certified copy of this plat.

Mr. HELLENTHAL.—We object to the introduction of this plat. I will ask the witness a few questions.

(By Mr. HELLENTHAL.)

Q. When was this survey of the Forrest made?

A. 1900.

Mr. HELLENTHAL.—Any survey that Mr. Hill might have made in 1900 could in no wise affect the location of the Lotta claim or in anywise establish the location of the Lotta claim or any other matter in controversy.

Objection overruled. Defendant allowed an exception.

The plat is marked Plaintiff's Exhibit "O" and

(Testimony of Lloyd G. Hill.)

admitted in evidence.

Q. Now, in making that survey for the Forrest lode claim made in 1900, who was making the survey with you? A. I was assisting Mr. Garside.

Q. The same George W. Garside that made the survey of the Lotta? A. Yes, sir.

Q. And helped on the Parish? A. Yes, sir.

Q. I will ask you if you found that the Forrest lode claim overlapped the Lotta claim in the manner and form indicated on this plat, the plat just offered in evidence. [223]

Mr. HELLENTHAL.—Objected to as incompetent, irrelevant and immaterial.

Objection sustained. Plaintiff allowed an exception.

Q. The map and plat that we have offered in evidence there correctly shows that survey as it is made upon the ground, does it? (Referring to Exhibit "O.") A. I think so, yes, sir. * * *

Q. Have you been up and down the Basin road a great deal? A. A great deal; yes, sir.

Q. About how many claims were you and Garside interested in making surveys of up there since 1900, approximately?

A. About twenty or thirty claims, perhaps.

Q. You surveyed all of the Dora group, did you?

A. Yes, sir.

Q. What about the Perseverance?

A. Yes, sir, all the Perseverance.

Q. And have you done some surveying also of contiguous property, adjacent property, belonging to the

(Testimony of Lloyd G. Hill.)

Alaska-Juneau Co., the defendant in this case?

A. Yes, sir.

Q. Now, this stake that you have spoken about. Where is it located with reference to the Basin road?

A. Located right southeast of the Basin road, the edge of the Basin road, I might say, right at the Basin road, beginning at the little bridge.

Q. I will hand you Defendant's Exhibit "I" and ask you if you have seen that photograph before.

A. I think this is the first time I have ever seen it.

Q. Did you hear the testimony of Mr. Ebner and Mr. Pond in identifying that stake?

A. Yes, sir, I did. [224]

Q. Now, there seems to be some wood or timber there around the stake—what is that? Is there a bridge there on the road?

A. That is the end of the bridge.

Q. No, the road.

A. On the Basin road, yes, sir.

Q. How long has that bridge been there?

A. The bridge has been there—I knew it in 1898, and I guess before that.

Q. It has been there since the building of the road?

A. Yes, I think so.

Q. This stake when it was located in the survey of the Forrest lode claim, where was it put with reference to where it is at the present time?

A. Same place.

Q. Now, you say that you were again on this property— I will withdraw that—

Q. Were you on this property in 1908?

(Testimony of Lloyd G. Hill.)

A. Yes, I was on the property again in 1908.

Q. At whose request and for what purpose did you go on there?

A. I went on there to assist in the survey of the Parish #2 lode at the request of Mr. Ebner.

Q. Who else was with you then?

A. Mr. Wettrick and Mr. Tripp and Mr. Ebner and one or two other men. I am not certain who they were.

Q. Well, were you on any portion of the Lotta lode claim then?

A. Yes, sir, we were on the same line, 5-6.

Q. On the lower side line of the Lotta?

A. Yes, sir, on the Lotta.

Q. What was done along there by Mr. Ebner and these people that were with you and yourself?

A. The line was brushed out and merely used as a backsight, [225] that is all, as a backsight, to commence the survey of the Parish #2 claim.

Q. I will ask you if on this lower side line of the Lotta, you saw any stakes there?

* * * * *

Q. Now, in 1908, then, when you made this survey of the Parish lode claim, just state to the Court what you did and what lines you ran out and what stakes, if any, you found on the Parish lode claim #2.

A. I didn't make the survey line; Mr. Wettrick was with me—we made it together. We took as our starting-point post #5 of the Lotta and prolonged the line 5-6 of the Lotta in a southeasterly direction to the southeast corner of the Parish #2 claim and

(Testimony of Lloyd G. Hill.)

found a stake there. We then turned 90° from that line to the left and run the end line of the Parish #2, the southeast end line of the Parish #2, a distance of 600 feet and also found a stake at the southwest corner of the Parish #2. We then turned and run parallel with the side line of the Lotta a distance of 1500 feet to the northeast corner of the Parish #2, and then run in a northeasterly direction 600 feet to the northeast corner of the Parish #2, and that brings us back on the line 5-6 of the Lotta claim.

Q. (By the COURT.) You said at the first turning you turned to the left?

A. Yes, sir, we turned to the left, facing the back line.

Q. That is, you commenced somewhere up here (indicating)?

A. No, I commenced down at this corner, Corner #5 of the Lotta.

Q. What do you call the back line? [226]

A. Well, I call that line 5-6 of the Lotta.

Q. What condition was this side line between the Lotta and the Parish in at that time?

A. It was very well defined—the brush was cut out—some small brush had grown up but you could retrace the line easily.

Q. Now, Mr. Hill, I will ask you if you had anything to do with the survey of the Royal lode claim survey #238?

A. No, sir, I didn't have anything to do with that.

Q. Do you know who made it?

A. George W. Garside, I think.

(Testimony of Lloyd G. Hill.)

Q. That is one of the claims that belongs to the defendant company, the Alaska-Juneau.

A. I don't know whether it does or not.

Q. I will ask you, Mr. Hill, if you are acquainted with the field-notes as they exist in the Surveyor-general's office, the official field-notes for the survey of the Royal lode claim—have you looked them over?

A. I have; yes, sir.

Q. I will ask you if in those official field-notes of the survey of the Royal lode, if you found any ties made to any of the corners of the Lotta claim?

* * * * *

Q. You said you made a survey of the Colorado lode claim? A. I have—I did, yes, sir.

Judge WINN.—At this time we desire to offer in evidence the complaint in Case #430-A of this court, The Ebner Gold Mining Company, plaintiff, versus The Alaska Juneau Gold Mining Company. We desire to offer the complaint in that suit in evidence for the purpose indicated this morning, to show that this defendant company has always recognized [227] the Ebner Gold Mining Company as a corporation, and for the further purpose to show that when there was a survey of the Colorado lode claim for the defendant company, it was found to conflict with the Parish #1 claim, and this is an adverse suit that grew out of an adverse that was filed by the Ebner Gold Mining Company in the Land Office, claiming that part of the Parish lode claim which is marked on this map and plat in heavy lines, and that the defendant company recognized the

(Testimony of Lloyd G. Hill.)

right of the Ebner Company and made an agreement that if they allowed the Royal to go to patent, they would deed the conflicting part to the Ebner Gold Mining Company, and that was the settlement of this suit—and they did deed this piece of property to the Ebner Company. It will serve the purpose of three or four matters in this case: In the first place it is the recognition by this company of the assessment work that had been kept up on the Parish #1 claim at that time—it was a valid existing claim, etc.

* * *

By the COURT.—The offer to show any admissions concerning title—I think it is against the policy of the law to allow compromises to be shown for that purpose. As to the rest of the offer, if you have any objection to make to it I will hear you.

Mr. HELLENTHAL.—It is a complaint in a suit brought by the Ebner Company, in which they are plaintiff, and it is a self-serving declaration.

Judge WINN.—We are going to follow it up and show they absolutely gave us a deed to it and gave a deed to the Ebner Gold Mining Company.

By the COURT.—Any stipulation or written agreement recognizing the company will be admitted for that purpose * * * as recognizing [228] the Ebner Gold Mining Company as a corporation. If there is some writing that did that, you may offer it for that purpose showing it was a *de facto* corporation and recognized by the defendant. So far as being admitted to recognize title in the Parish #1 and the compromise of the litigation, I don't think

(Testimony of Lloyd G. Hill.)

it is admissible for that purpose. The objection to the complaint will be sustained at this time.

Plaintiff is allowed an exception to the ruling of the Court.

Q. We stopped, I believe, in the year 1908—have you been upon the Lotta lode claim and the Parish #2 lode claim since 1908? A. Yes, sir, I have.

Q. When were you on those claims since that date?

A. I was on them in 1910.

Q. For what purpose did you go on then?

A. I was assisting Mr. Wettrick in the resurvey of the Parish #2.

Q. What time in 1910 were you on there?

A. I was on and around there almost continuously from August first up to the first of December of that year.

Q. Were you over at any of the side or end lines of the Lotta claim during that time?

A. I was, yes, sir, during that period.

* * * * *

Q. Mr. Hill, you know where the flume is upon the ground up there that has been constructed by the defendant company, don't you?

A. The high line flume?

Q. The flume-line that has been constructed by the defendant company—they haven't but one flume-line up there, have they? [229]

A. Yes, sir, I know where that is.

Q. Have you surveyed off that flume-line?

A. I assisted on the survey of it; yes, sir.

Q. You and Mr. Wettrick? A. Wettrick and I.

(Testimony of Lloyd G. Hill.)

Q. Did you see the defendant company's flume-line on the ground? A. Yes, sir.

Q. Do you know how it is constructed?

A. Yes, sir.

Q. And surveyed it? A. Yes, sir.

Q. And know where the dam is on the ground?

A. I do.

Q. Now, I will ask you where that dam is with respect to the common side line of the Lotta and the Parish #2 lode claim?

A. The major portion of the dam is entirely within the boundaries of the Lotta lode claim.

Q. And is any part of the flume constructed on the Lotta lode claim? A. No, sir.

Q. What claim does this flume extend over that is on this exhibit "N"?

A. The flume extends across the Parish #2 lode.

Q. Across the entire width of it?

A. Across the entire width of it.

Q. As indicated on this map and plat?

A. Yes, sir.

Q. I will ask you if this map and plat in its entirety is made by actual surveys made on the ground and information and records you found in the surveyor-general's office? [230]

A. It is, yes, sir.

Q. What information and data did you use in making this exhibit?

A. Surveys were made by Mr. Wettrick and me, surveys by him and I on the ground and from the official notes of the various patent surveys in the sur-

(Testimony of Lloyd G. Hill.)

veyor general's office.

Q. Then, as I understand you, this survey is made as the claims appear absolutely on the ground, by actual survey, monuments, etc.? A. Yes, sir.

Mr. HELLENTHAL.—We object to that as leading.

Objection sustained.

Q. How is this map and plat made with reference to your actual survey and monuments, etc., and the data you have just spoken of?

A. It is made in accordance with the monuments on the ground and notes that we took from the surveyor general's office.

Q. This word "compressor," apparently a building marked somewhere about the center of the Lotta lode claim on the creek, what is that?

A. That is the foundation and covering for a twenty-stamp mill, I think, and compressor.

Mr. HELLENTHAL.—How is that?

A. It is the foundation and covering for a twenty-stamp mill and also an air-compressor.

Q. It is on the Lotta? A. Lotta, yes, sir.

Q. Is that the Ebner mill?

A. That is what they call the new Ebner mill; yes, sir.

Q. A foundation? A. Yes, sir. [231]

Q. There is no mill building there?

A. No, sir.

Q. Now, the Ebner mill you have been testifying concerning and the 15-stamp mill that is on the property, is that what is marked Ebner mill on the Taku

(Testimony of Lloyd G. Hill.)

lode survey 88? A. 88; yes, sir.

Q. And what is that marked "boarding-house"?

A. That is the bunk-house or boarding-house of the Ebner Company on the Taku lode.

Q. What have you marked up here as the Ebner dam—what is that?

A. That is the original of the Ebner dam and the intake on the Golden Fleece claim.

Q. How is the wagon road going up that creek indicated, going up Gold Creek,—how is it indicated on this map?

A. The wagon road running up Gold Creek is indicated with a heavy black line marked "road."

Q. What is the other object you marked just above that heavy black line called "flume"?

A. That is the high line flume of the California-Nevada Copper Company and marked in blue.

Q. Who surveyed the line of that flume?

A. Wettrick and myself.

Q. Approximately, Mr. Hill, or get it exactly if you can, how many feet of the defendant company's flume, is crossing the Parish #2 lode claim?

A. It would be approximately 800 to 850 feet.

Q. I see you have marked across the Parish lode claim a wagon road,—what wagon road is that,—is that the regular traveled wagon road going to the Perseverance Company's mine?

A. Yes, sir, the Silver Bow Basin road, the wagon road.

Q. Crossing what claim? [232]

A. Crossing the Parish #2.

(Testimony of Lloyd G. Hill.)

Q. What is the word "flume" indicated down here about south of the centre line of the Parish lode claim?

A. That represents the flume constructed by the Alaska-Juneau Company on the east side of Gold Creek.

Q. Do you know anything about a tunnel on the Parish lode claim, somewhere down near the creek level, just about—I don't remember whether it is just on a level with the defendant company's flume or not, but right near their flume line—do you know anything about a tunnel there?

A. Owned by whom?

Q. Well, were you in court when Mr. Ebner testified this morning? A. No, sir, I was not here.

Q. How many tunnels do you know of being on the Parish lode claim? A. I know of four.

By the COURT.—Which Parish?

Q. Parish #2. Do you know of a tunnel down near the level of the flume line of the defendant company? A. Yes, I do.

Q. Here is a photograph marked Plaintiff's Exhibit "M." I will ask you if this tunnel you spoke of as being down below the flume-line,—if you can see it indicated in that photograph?

A. I can, yes, sir.

Q. Have you ever mentioned the length of that tunnel? A. Yes, sir.

Q. Mr. Ebner didn't know the length of it this morning—do you know the length of it?

A. 32 feet, 5 by 7 feet and 32 feet long under cover.

(Testimony of Lloyd G. Hill.)

Q. I have here now from the surveyor general's office the official field-notes in Surveys #237, 238 and 239—one of these claims which is indicated as 238 is the Royal lode claim as indicated on this Exhibit "N." Now, I will ask you to take these field-notes and go over them and see whether or not there is any tie from any natural object on the Royal lode claim to any one of the stakes of the Lotta lode claim.

Mr. HELLENTHAL.—We object to this testimony, in the first place, because it is hearsay—it depends for its truth or falsity on something other than evidence; and in the second place, because it cannot be offered as an admission because the notes were not made by any party to this record, nor was the party who made the notes in anywise connected with any part of the record, etc.

After argument the objection was by the Court overruled. Defendant allowed an exception to the ruling.

A. Yes, sir, there is; the tie is given on these notes.

Mr. HELLENTHAL.—When was the Royal survey made? What is the date of those notes you have there in your hand? A. There is no date on them.

Mr. HELLENTHAL.—I object to it, further, on the ground that it is not the best evidence—they show for themselves.

The WITNESS.—August, 1891.

By the COURT.—The Court will not undertake to take an original document out of the surveyor general's office; it may be read into the record.

The WITNESS.—August, 1891, and the bearing is given here.

(Testimony of Lloyd G. Hill.)

Mr. HELLENTHAL.—I call to the Court's attention the fact that that is simply some notes subsequent to the patenting of the Lotta,—I don't think that was in the record when I made [234] the former objection, and I make the same objection with that addition.

Objection overruled. Defendant allowed an exception.

The WITNESS.—Beginning at Post marked #1, U. S. Survey #238, identical with post #3 and 5, Lots #87 and 88, respectively, at notice of location; whence mouth of tunnel 200 feet long, ten feet wide and eight feet high trending east bears south 29° east 120 feet distant.

By the COURT.—That portion of the field-notes will be admitted in evidence that the field-notes may be withdrawn until such time as the surveyor general's office can furnish a certified copy of that portion.

Q. Now, I will ask you if you have ever been upon the ground of the Royal lode claim and found this tunnel that you have referred to in the field-notes that you have just read? A. I have, yes, sir.

Q. I will ask you if you took the bearing, the courses and distances of that from the corner post of the Lotta stake as you have been testifying concerning and as it is upon the ground—have you done that? A. Yes, sir.

Q. Just state to the Court what you found in that regard.

A. Well, I found that it did not come out as the

(Testimony of Lloyd G. Hill.)

notes in the patent called for quite,—the difference is 12 feet in length and the difference in the course is about 7°.

By the COURT.—What did you find it on the ground, the length? A. 120 feet on the ground.

Q. That would throw it, of course, further down the hill and take off some of the end of the Lotta claim?

A. It is very indefinite, the mouth of the tunnel, rather [235] indefinite to get at exactly where it might have been measured before as a tunnel caves from year to year. You might measure where you break ground or you might take it under the roof of the tunnel—that would make a difference.

Q. So you only found this difference you testified to from an actual survey made from some point you took as the mouth of the tunnel?

A. Yes, sir; which the former surveyor may not have taken.

By the COURT.—But from the point you took as the mouth of the tunnel the call was over ten feet short—the call would pull the claim up the creek from what you claim it is?

A. Yes, sir; it wouldn't pull the claim up the creek; it would throw the claim to the northwest twelve feet.

By the COURT.—It would pull it part of that distance up the creek?

A. Yes, a very small part of that distance.

Q. I will ask you—this stake you spoke of and the corner post from which you took those courses and

(Testimony of Lloyd G. Hill.)

distances from the mouth of what you found to be an old tunnel up there—I will ask you if that place up there is subject to snow slides or not—how is that ground up there?

A. Very steep ground up there. This is an angle of 35°, I expect, from the horizontal.

Q. Now, I have the official field-notes here, Mr. Hill, of the United States Survey #545, which includes a group of claims I think you have referred to as the Dora group, one of which is the Forrest you have testified you assisted George Garside to survey in 1900. I wish you would take these field-notes and just read off to the Court just what the conflict was between the survey that was made of the Forrest [236] at that time and the Lotta.

Mr. HELLENTHAL.—When was that survey made?

A. In 1900.

Mr. HELLENTHAL.—We object to the question as incompetent, irrelevant and immaterial. The question as to what conflict Mr. Hill found is a question for the Court. He can only testify what he found on the ground at that time.

Objection overruled. Defendant allowed an exception.

A. You want a description of the conflict?

Q. Yes.

A. I will read the notes. It is south 1–30 west 122 feet; north 69–25 west 121 feet; south 33–45 east 198 feet, containing an area of .1594 acres.

Mr. SHACKLEFORD.—It is understood that the

(Testimony of Lloyd G. Hill.)

portion of the official field-notes of mineral survey 545 may be substituted by a certified copy from the surveyor general's office.

Judge WINN.—That portion which we read into the record.

Mr. SHACKLEFORD.—Subject to such objections as we may offer to the evidence given in connection with it.

By the COURT.—It will be so ordered, with the understanding that the same objections you have already made will be made to the certified copy.

Mr. HELLENTHAL.—Mr. Hill, that .1594 acres—that is the area of the claim?

A. That is the area of the conflict,—.1594 acres.

Q. I don't believe I asked you about running off the lines of the Parish #2 lode claim—I don't believe I asked you anything about how you surveyed it off on the ground?

A. Yes, I think I answered that—the Parish #2.
[237]

Q. Well, is this map, so far as the survey of the Parish #2 is concerned, made according to the survey of it that you made upon the ground? I am referring now to Exhibit "N." A. Yes, sir.

* * * * *

Judge WINN.—That is all at this time.

Cross-examination.

(By Mr. HELLENTHAL.)

* * * * *

Q. Mr. Hill, you also made the survey of the Oregon lode at the time it was located by Mr. Corbus?

(Testimony of Lloyd G. Hill.)

Judge WINN.—We object as not proper cross-examination.

Objection overruled. Plaintiff allowed an exception.

Q. You surveyed the lines of the Oregon at the time Mr. Corbus located it?

Judge WINN.—Which one of the Oregons do you mean?

Q. I mean the Oregon that was located in 1899—you remember that? A. Yes, I remember it.

Q. And you helped to locate those stakes, didn't you?

Judge WINN.—You will allow me an exception to all this testimony?

The COURT.—Yes, sir.

A. Yes, Mr. Garside and I went up there and set the stakes of the Oregon.

Q. At the four corners?

A. Set the notice and put up the corners.

Q. Those stakes were set up in accordance with the description given in the notice?

A. To the best of my belief, yes, sir. [238]

Q. And you ran the lines of the Oregon as described in the location notice as located by Mr. Corbus? A. Yes, sir.

Q. I have a copy here of the Oregon notice—it is a copy of a certified copy. It is not a certified copy by the Commissioner but the Commissioner made a certified copy and this is a copy. Here is the original in the book—I wish you would mark that paper, Mr. Reporter, Defendants' Exhibit #4 for Identification.

(Testimony of Lloyd G. Hill.)

(It is so marked.)

(Mr. Shackleford reads the original from the book and Judge Winn checked the copy.)

Q. Mr. Hill, you say you ran the lines and set the stakes on the Oregon claim as located in 1899?

A. I assisted Mr. Garside in the work; yes, sir.

Q. You didn't know at that time that there was any Parish claim on the ground? A. No, sir.

Q. Had you known that or had any evidence of it, you would have informed Mr. Corbus about it?

A. Yes, sir, I should have.

Q. You had not consulted the records, I don't suppose? A. No, sir.

Q. And there was nothing to indicate to you that there was another location on the ground?

A. I didn't see any stakes.

Q. You didn't know, had no intimation, that anybody else claimed the ground?

A. Well, I may have had that because the ground had been located on and off, Mr. Garside informed me, but from time to time it lapsed and had been relocated like many other [239] claims in this vicinity.

Q. Now, you knew at that time where the southerly line of the Lotta was? A. Yes, I did.

Q. I hand you here Defendant's Identification #4, which purports to be a copy of the notice of location of the Oregon, and ask you to look at it and see if that ties to the Lotta side line?

A. It does, yes, sir.

Q. Now, I will ask you to state—read that notice

(Testimony of Lloyd G. Hill.)

over, read those notes, and see if the tie there given corresponds with your map exhibit "N"?

A. Well, of course, it would be pretty hard for me to fix this Oregon location notice to my claims, because the Oregon location is not on that map.

Q. You know, however, where the Last Chance corners are on your map—are they on your map?

A. Yes, sir, the Last Chance corners are on my map.

Q. You can easily measure from the Last Chance corners to the southerly side line of the Lotta?

A. Yes, sir.

Q. Along the course given in that notice?

A. Approximately, yes, sir.

Q. Have you a scale? A. Yes, sir.

Q. Take your scale and measure that course and see how much it will be?

Judge WINN.—This all goes in subject to my objection that it is improper cross-examination and immaterial and my exception?

The COURT.—Yes, sir. [240]

A. That would be approximately 1400 feet. That, of course, is dependent upon the course, the more the course is tipped to the east the shorter that line necessarily would be in intersecting the Lotta side line.

* * * * *

Q. You remember surveying the Parish lode claim for Mr. Ebner?

A. I remember assisting on the Parish lode in 1908; yes, sir.

(Testimony of Lloyd G. Hill.)

Q. I mean the Parish #2? A. Yes, sir.

Q. Did you find any stakes there at the time?

A. I did, yes, sir.

Q. How many stakes? A. Four stakes.

Q. All in place? A. All in place, yes, sir.

Q. Large or small?

A. I think they were four inches square.

Q. Did they check up pretty well with the survey? A. Yes, sir.

Q. How near?

A. Very close—within a few feet.

Q. Now, Mr. Hill, is it not a fact that your Exhibit “H” merely lays out the Lotta with reference to those stakes, without regarding any course or distance or anything else—just measure from the stakes that you find on the ground there and locate the parallelograms—isn’t that true? A. No, sir.

Q. What else did you do there? * * *

Q. Now, I call your attention to a map marked for identification [241] Defendant’s Exhibit #6 and ask you to look at that map and see if that creek is on there about right.

Judge WINN.—We object to that as not proper cross-examination.

Objection overruled. Plaintiff allowed an exception.

A. I would not be at all in a position to say so, Mr. Hellenthal, until I had been able to expert that map—you can’t tell a thing by looking at it.

Q. Anyhow you will note there a parallelogram, or approximately a parallelogram, drawn in black ink,

(Testimony of Lloyd G. Hill.)

don't you? A. I do.

Q. Mark the west side line of the Lotta, one of the side lines claimed by the Ebner Company; do you note that? A. Yes, sir, I do.

Q. That parallelogram, assuming that the stakes are in the ground as you do on making your Exhibit "N," would be about right, wouldn't it?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial, no foundation laid for the introduction of this map, no evidence of its correctness and not proper cross-examination.

Objection overruled. Plaintiff allowed an exception.

A. I absolutely refuse to certify to the correctness of this map at the present time.

Q. You don't know whether it would be right or not? A. No.

Q. Now, Mr. Hill, assuming that the creek is in the right position on that map,—I will now call your attention to a parallelogram appearing on this map drawn in red ink—do you notice that?

A. Yes, sir. [242]

Q. I will call your attention to that parallelogram and I will ask you to state to the Court—examine this parallelogram carefully, examine the courses and distances given in the patent and field-notes, examine the ties to the creek given in the patent field-notes, being 1200 feet from the southerly side line and forty feet on the upper side line, and I will ask you, in observing those courses and distances and those ties to the creek, if there is any possible place

(Testimony of Lloyd G. Hill.)

that you can lay that claim except the place where it now lies as indicated by the red line—and to assist you I will hand you a piece of cardboard drawn the size of the parallelogram and a scale.

Judge WINN.—I object to that.

By the COURT.—If the witness feels he can answer the question, he may take the time to do so.

A. I wouldn't care to attempt it here in the courtroom—it is hardly fair to a man working here; you can't work the way you can in your office.

Q. If you had all the instruments you might be able to tell if there was any place you could lay that parallelogram?

A. I don't know the relative position—it can swing; you can move it anywhere you wanted—it is tied to nothing.

Q. We assume that that creek is on the plat correctly? A. Yes, sir.

Q. Now, you have the ties in the patent?

A. Yes, sir.

Q. The courses and distances in the patent?

A. Yes, sir.

Q. Now, I am asking you to put that claim on that paper in any [243] shape that you can put it, other than the shape it is in, and observe those courses and distances and those ties to the creek. I don't care where you put it—put it anywhere. Let us see how you do it.

Objected to.

By the COURT.—If the counsel wants to submit the map to the witness and have him return to the

(Testimony of Lloyd G. Hill.)

stand to-morrow morning at ten o'clock to answer the question, he may do so, but to take the time in the courtroom to enter into a mathematical calculation would consume too much time.

Mr. HELLENTHAL.—I will do so. The witness may take the map and answer the question to-morrow morning.

Another map is marked for identification Defendant's Exhibit #7.

Q. I now call your attention to the chart marked for identification Defendant's Exhibit #7 and ask you to look at it—I call your attention to stake #5 of the Colorado claim—do you see where that is there? A. No, sir, I don't see it.

Q. Do you see that corner where the stake ought to be? A. It is not marked.

Q. You know where the corner is?

A. I don't know where it is on this map; no, sir. I didn't make this map—I just sat here and looked at it.

Q. You can tell by examining that map?

A. You can't tell those things in our profession.

Q. Can't you tell where the northwesterly corner of the Colorado is?

Judge WINN.—We object to that—there is no tie; there is a lot of random claims on the map, without tying them to any group [244] of claims or any monument, and is unfair to the witness.

Objection overruled. Plaintiff allowed an exception.

Q. You know which is north?

(Testimony of Lloyd G. Hill.)

A. Yes, I know what is north.

Q. You can tell which is the northwest corner?

A. I presume the northwesterly corner is over here, of the Colorado.

Mr. BURTON.—You mean the northwest corner of the claim you have marked on that map as the Colorado?

Mr. HELLENTHAL.—Exactly.

Q. That is Corner #5, isn't it?

Same objection. Objection overruled. Plaintiff allowed an exception.

Q. The northwesterly corner of the Colorado, that is Corner #5? A. Yes, sir, I think so.

Q. Corner #4 is the northeasterly corner?

Judge WINN.—You mean as drawn on this map?

Mr. HELLENTHAL.—Yes, sir.

A. No, sir, no—corner #4 is the southwesterly corner.

Q. What is the northeasterly corner?

A. The northeasterly corner is corner #6.

Q. Just take your pencil and mark the number of those corners on there, will you?

Same objection. Objection overruled. Plaintiff allowed an exception.

A. This is 5, purports to be, and this is 6.

Q. Now, Mr. Hill, have you got a scale?

A. I have.

Q. Would you run the number of feet along the line indicated here on the ground 1474.11 feet according to the course [245] given in the patent, and see if you arrive at the point given or indicated on

(Testimony of F. J. Wettrick.)

this identification. Just put a naught there in pencil, will you? Indicate it by a naught, by a round circle—see if you arrive there, will you? See if that is right?

Objected to as not proper cross-examination.

Judge WINN.—If Mr. Hellenthal will indicate some object in this—

Mr. HELLENTHAL.—We are trying to locate the Lotta—that is the object.

* * * * *

(Balance of testimony regarding Lotta.)

Witness excused. [246]

[Testimony of F. J. Wettrick, for Plaintiff.]

F. J. WETTRICK, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. How long have you been living in Alaska?

A. About four and a half or five years.

Q. What is your business, trade or profession?

A. That of a civil engineer, United States deputy mineral and land surveyor.

Q. You hold such an appointment here in Alaska now? A. I do.

Q. Are you acquainted with any of the property known as the Ebner group of mines? A. I am.

Q. Located up Gold Creek? A. Yes, sir.

Q. Are you acquainted with one of the claims in that group known as the Lotta?

A. I am. * * *

(Testimony of F. J. Wettrick.)

Q. When were you first upon the ground there for the purpose of making any survey or running out any lines? A. 1908.

Q. At whose request did you go upon this property? A. At the request of Mr. Ebner.

Q. Who else was in company with you, if any one?

A. Mr. Ebner, Tripp, Mr. Hill, with two axmen, I believe—an axman or two.

Q. Now, referring to Exhibit “N” of the plaintiff in this case, I will ask you to state which one of those claims you had anything to do with in surveying at that time?

A. The Parish #1 and 2 and then some additional lines in red— [247] as far as claims are concerned, the Parish #1 and 2 are the only claims. I want to qualify that—I surveyed also a portion of the lines of the Cape Horn and Cape Horn #2 further down on the creek, not shown on the plat.

Q. Were you on any of the end or side lines of the Lotta? A. I was.

Q. What lines, if any, were you on?

A. On the southwesterly side line of the Lotta and the southerly end line of the Lotta at that time.

Q. What were you doing there?

A. I went there for the purpose of locating the corners of the claims mentioned and getting a starting point for the running out and relocating or re-surveying of the lines of the Parish #1 and 2.

Q. Parish Number 1 and 2, both? A. Yes, sir.

Q. Now, I will ask you to state what, if any, corners, posts, stakes or monuments you found upon

(Testimony of F. J. Wettrick.)

any of the lines of the Lotta lode claim?

* * * * *

Q. Now, what, if anything, did you do as regards running out any of the lines of the Parish lode #2 at that time?

A. Having gotten my bearing as the bearing of the westerly side line of the Lotta, I ran in a southeasterly direction 124.2 feet, about 125 feet, and I found there a post 5x5 two feet above ground.

Q. What else?

A. And I turned from that point at right angles for my backsight and ran 600 feet in a southwesterly direction—the course is parallel to the end line of the Lotta claim, the [248] point from which I staked and found a post at the other end of that end line. From there I turned and ran across the southwesterly end line, turned at right angles and continued up this line of the Parish. I also ran up in that direction, that is, in a southeasterly direction on the side line of the Royal claim some distance and over the old slashing, and we rebrushed the line.

Q. Is that also an end line of any other claim?

A. That is the end line of the Colorado claim.

Q. What about the Parish?

A. It is a side line of the Parish #1 claim, being identical with the southwesterly side line of the Royal.

Q. Is that last line you have just mentioned an extension of the lower side line of the Lotta claim?

A. Yes, sir, the same course.

Judge WINN.—I desire at this time to offer in

evidence the contract that exists between this company, the defendant company, and the Ebner Gold Mining Co., for the conveyance to the Ebner Company of the part that was in conflict with the Parish #1 and the Colorado claim, and I desire also to follow up that contract, which was an agreement to convey the conflict with the Ebner Company with a deed. I do it for several reasons. * * * The first reason is they showed they recognized the Parish #1 lode claim as an existing claim, * * * and furthermore to show that this company, this defendant company, has always recognized the defendant company as a corporation and dealt with it, etc. We also offer the notice of location of the Parish #1—it ties up to the Lotta.

Mr. SHACKLEFORD.—We object to this offer. It is apparent [249] from the papers, from the exhibit offered, that it is a matter of compromise of a lawsuit then pending between the parties, that was brought by the Ebner Gold Mining Co.

Judge WINN.—It was not a compromise—they gave us everything we asked.

Mr. SHACKLEFORD.—It is objectionable on that ground, and the further objection, if it is offered to prove the Ebner Company is a corporation in fact, the transactions between the parties is in no way binding upon the defendant company. And further, it does not tie the Lotta claim in any way and refers to a conflict between the Colorado claim as a claim that is not in dispute in this suit.

By the COURT.—It expressly appears here that

(Testimony of F. J. Wettrick.)

“in compromise and settlement of said litigation, it is hereby understood and agreed, etc.” It is against public policy to allow admissions, to contend to admissions, in compromises of litigation. The law encourages compromises of litigation out of court, but it don’t amount to anything more than a quitclaim deed as far as admissions are concerned, if it amounts to as much. Your first offer of these papers will be admitted for the purpose of showing they treated with this company as a corporation. Your second offer of the record of the location notice of the Parish #1 which ties up to the Lotta will be rejected on the ground for which it was offered.

Defendant allowed an exception to the ruling of the Court. The papers are to be entered into the record.

Adjourned until to-morrow (Friday), May 26, 1911. [250]

Friday, May 26, 1911—Morning Session.

Continuation of the direct examination of Mr. WETTRICK.

(By Judge WINN.)

Q. I believe, Mr. Wettrick, yesterday I left off after asking what you did on this property in controversy on the Lotta and Parish #2 lode claims in the year 1908. Now did you ever make any further survey of the Parish lode claim since that date?

A. Yes, sir.

Q. When was that?

A. In the year 1910, last fall.

Q. I wish you would state briefly what monuments

(Testimony of F. J. Wettrick.)

you found on the common side line between the Parish #2 lode claim and the Lotta when you made this survey in 1910 and all other monuments that you found on the Parish lode claim.

A. I found Corner # 5 on the side line common of the Parish #2 lode and the Lotta lode, also monument #3 of the Parish #2 lode, the monument at the intersection of the Forrest lode with the side line of the Parish and the Lotta; monument #4 of the Parish #2 lode, which is common to monument #1 of the Parish #1 lode.

Q. Now, I will ask you if at that time you discovered any stakes of the Forrest lode claim?

Mr. SHACKLEFORD.—We object to that on the ground that it is a subsequent survey.

Objection overruled. Defendant allowed an exception.

A. Yes, I did.

Q. Just state to the Court what you found with reference to the Forrest lode claim.

A. I found corner post #1 of the Forrest lode and also the [251] post at the intersection of the Lotta side line which is common to the Parish #2 lode side line, this intersection between the intersection of the end line of the Forrest with that common side line.

Q. Can you designate a little more particularly about what part of the Parish lode #2 you discovered the corner post #1 of the Forrest lode?

A. Yes.

Same objection. Objection sustained.

Q. Have you indicated on this map, Mr. Wettrick,

(Testimony of F. J. Wettrick.)

“N” in corner post #1 of the Forrest lode claim?

A. It is indicated.

Q. I will ask you if you have ever retraced or made a survey of the lines of the Lotta lode claim?

A. I have.

Q. When did you do that?

A. Did that in the year 1910; last fall.

* * * * *

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You are the partner and business associate of Mr. Lloyd G. Hill, are you not? A. I am.

Q. That is the same Hill that testified on yesterday? A. Yes, sir.

Q. And you are collaborating with Hill in the making of these surveys? A. Yes, sir.

Q. Worked together? A. More or less.

Q. Well, you were together, both of you there at the same [252] time, is that true?

A. On the ground?

Q. Yes. A. Not always, not every day; no.

Q. You made the survey together? A. Yes, sir.

Q. There might be one absent for a while but you surveyed together? A. Yes, in the main.

Q. He testifies to your notes and you to his, is that the way of it? A. Certainly.

* * * * *

Q. You never took a college course in civil engineering? A. I did.

Q. Where?

A. I took the course at Valparaiso College and I

(Testimony of F. J. Wettrick.)

took a post-graduate course in the University of Washington.

Q. You are now the partner of Mr. Hill?

A. Yes, sir.

* * * * *

Q. In doing this surveying you were employed by the California & Nevada Company?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial and improper cross-examination.

Objection overruled. Plaintiff allowed an exception.

A. In making the survey last year I was thought to be employed by the California & Nevada Copper Company.

(By Judge WINN.)

Q. Who employed you—did Mr. Ebner employ you or Mr. Bent? [253]

A. Mr. Bent last year. In 1908 when I ran over some of the ground I was employed by Mr. Ebner.

Q. We are getting you to do this work?

A. Yes, sir.

Q. We are? A. Yes, sir. * * *

Witness excused. [254]

[Testimony of John Perelle, for Plaintiff.]

JOHN PERELLE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your business? A. Mining.

(Testimony of John Perelle.)

Q. How long have you lived in and about Juneau?

A. For nineteen years.

Q. Do you know William M. Ebner?

A. Yes, sir.

Q. How long have you known him?

A. Know him about the same time.

Q. About how long?

A. Nineteen years.

Q. Did you ever act as a superintendent for him up at the Ebner mines? A. Yes, sir.

Q. Do you remember what years?

A. 1900 and 1901.

Q. Do you know approximately the ground up there that they call the Parish #2 lode claim?

A. Yes, sir.

Q. I will ask you if there was any work done on that lode claim the Parish #2 in the years 1901 and 1902?

A. Yes, sir, there was a little work done there.

Q. There was work done there? A. Yes, sir.

Q. Do you remember about how many men were working over there at different times during those years? I will confine it to 1901.

Mr. SHACKLEFORD.—We object to the form of the question. We [255] want to know who the men are.

Objection overruled. Defendant allowed an exception.

Q. 1900 and 1901 were the two years you stated?

A. Yes, sir.

Q. Do you remember any men in 1901 doing any

(Testimony of John Perelle.)

work on that mining claim, Parish #2?

A. Yes, I had one man there nearly two months, steady working, and then I had several, sometimes eight or ten, some days here and there and then took them out working.

Mr. SHACKLEFORD.—We move to strike the answer and object to the testimony unless the witness goes into details.

By the COURT.—The value of it will be tested by cross-examination.

Objection overruled, motion denied. Defendant is allowed an exception.

Q. Now, in 1902 what, if anything, do you remember of men being on the Parish #2 doing any work on it? A. I was not there at that time.

Q. 1901?

A. I didn't work myself,—I had men there myself at that time. I was in charge of the work and had men working there in it. I had men to start in the mine. I put them down there to work, maybe two or three days, and took them off again and then put them on again, but I had one man steadily nearly two months.

Q. That was in 1901?

A. Yes, sir, that was in 1901, and in 1900 I was over there, too.

Q. About the same thing in 1900? A. Yes, sir.

Q. Now, I will ask you in 1908 if you did any work on the Parish #2 lode claim?

A. Yes, sir, I did—myself. [256]

Q. Did anybody help you?

(Testimony of John Perelle.)

A. Yes, I had a man helping me.

Q. Who was the man?

A. A man named Dominick Caesar.

Q. He is here in the courtroom? A. Yes, sir.

Q. Do you know how many days Caesar worked there?

A. The same as I did myself. We worked about ten days each.

Q. What kind of work did you and Dominick Caesar do on this mining claim?

A. We put in an open cut and stripped the surface and drilled some holes and blasted—whatever Mr. Ebner told me to do—shot here and there, all over the lode and put an open cut across and then ran the creek and the gulch, stripping the vein.

Judge WINN.—That is all.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. Do you see the Parish lode here?

A. Yes, sir.

Q. Now, show the Court, by reference to that map, where the work was done you did in 1900.

A. I done it right down here in the creek and all along here.

Q. Near this point marked flume?

A. Yes, from the flume, where the flume is now built.

Q. Where is the other spot?

A. And further up, all along, done some work all over.

Q. All along over the surface? A. Yes, sir.

(Testimony of John Perelle.)

Q. Did you have any special instructions as to the development of any particular ore body or ore showing on that ground [257] when you went there?

A. Yes, sir.

Q. What particular spot of quartz were you driving for or trying to uncover—what was pointed out to you as the spot you were to work for?

A. Mr. Ebner told me to put two men there driving ahead and that is all I know about it.

Q. You don't know what the object of the work was? A. No.

Q. You just put two men on there to work, to do the assessment work?

A. Mr. Ebner gave me instructions to do the work and I did what he told me.

Q. You had no definite idea at the time of any particular ore body or ore showing on that claim that you were to uncover or to drive for?

A. Mr. Ebner never explained to me that much.

Q. He never explained that to you? A. No.

Q. Did you do any of that work up here in that spot marked open cut along the end line of the Parish #1 lode, the joint end line between Parish #1 and 2?

A. I can't remember exactly those things now. It was long ago, you know. I had men scattered all along from the creek way up to the cabin.

Q. Did you have anything to do with doing the assessment work on the Parish #1 in that year 1900?

A. I don't remember exactly the line.

Q. I am talking about 1900.

A. I started from the creek and worked all along

(Testimony of John Perelle.)

clear up to [258] that cabin you see there on the survey, an open cut, and drove tunnels and cut trail, etc.

Q. Above that—you know where the Parish #2 is, Parish #1 and 2—there are two claims?

A. Yes, sir.

Q. And when you did the assessment work you did it on the two claims at the same time? A. Yes, sir.

Q. Where did you do any work on the Parish #1—what work did you do to apply on the Parish #1, the upper claim?

A. We made a trail and cut and stripped it.

Q. What was the trail to?

A. All over the surface, wherever we wanted to go. My instructions were from Ebner, and I don't know what he wanted to do it for,—I did what he told me.

Q. Where was the cut made?

A. If you go there I can show you.

Q. About where?

A. I don't know exactly now. That is long ago, you know.

Q. How far from the creek?

A. I don't know just exactly.

Q. When you had those men there working, you were working on the two claims?

A. Yes, and I worked further up too.

Q. What claims were you working on further up?

A. Way up on top of the mountain, we cut trail way up there.

Q. And that is included in the work you have been testifying about?

(Testimony of John Perelle.)

A. I had one man with me there two months steady. Sometimes I had seven or eight, some days, and some days I took them off again. [259]

Q. Did you keep account of that? A. Yes, sir.

Q. Turned the books into the company, the time-books? A. Yes, sir.

Mr. SHACKLEFORD.—We would like to have the time-books.

Judge WINN.—We haven't got the time-books—the same time-books that Mr. Ebner testified the other day he didn't have.

Q. Now, you told us about sending a man up to do that work. I want you to tell what you did to develop that claim,—what that work was, how much ground you took out, and definitely what it was that you did that tended to develop the claim, so the Court can understand it?

Judge WINN.—We object to that. Objection overruled. Plaintiff allowed an exception.

A. Mr. Ebner was there every day and every day was telling me what to do—

Q. I don't care what he told you. The thing I want to know and I presume the Court wants to know is, what you did on that ground, that is, how much ground you opened up?

A. We had a tunnel there and we started in—

Q. In 1900? A. In 1900.

Q. Where was the tunnel started?

A. The tunnel was a little way above the creek.

Q. Near the creek? A. Yes, sir, near the creek.

Q. How far did you drive in there?

(Testimony of John Perelle.)

A. Just to start it.

Q. Did you get underground, that is, did you get any overhead? A. Yes, sir.

Q. How far in did you get? [260]

A. Just a few feet when I was there and then we cut the trail and blasted out the trail and rocks.

Q. Where did that trail lead to?

A. Right down to the tunnel.

Q. Where from? Show me where the trail is on the ground.

A. On top of the bank and go down to the creek. You can't go down there without making a place to walk down—we had a ladder.

Q. Did you have any trail up to the Parish #1?

A. Yes, sir.

Q. That was part of that work?

A. And an open cut—we did some open cut.

Q. Across Parish #1? A. Number 1 and 2.

Q. Where are those open cuts now—have you been on the ground recently?

A. No, I have not been on the ground.

Q. Not since 1908? A. Not since 1901.

Q. Have you testified you did work there in 1908?

A. Yes, but not the same place I did before.

Q. You didn't go up to the old place where you worked?

A. No, I just went and done the work where he told me to do it that year. He came there and showed me the place I was to work and told me what to do.

Q. Did he tell you what to do? A. Yes, sir.

Q. What did he tell you?

(Testimony of John Perelle.)

A. He told me to put in a cut across and strip the surface.

Q. Come and show me where you put that cut approximately. [261]

A. I can't show you on the map.

Q. You have been used to using maps in reference to mining.

A. There was a cut here—that must be 300 feet above the creek.

Q. How near was the tunnel you drove?

A. The tunnel was nearer to the line.

Q. What did you uncover in that cut?

A. I uncovered diurite and quartz.

Q. Now, you went up there in 1908, did you, to do some work? A. Yes, sir.

Q. Who employed you? A. Mr. Ebner.

Q. What time was that?

A. In December some time.

Q. You say you were up there in 1902?

A. 1901 and 1900.

Q. You were not up there in 1902? A. No.

Q. And you were up there in 1908?

A. Yes, sir.

Q. Mr. Ebner hired you? A. Yes, sir.

Q. What time did you go?

A. In December some time—I don't remember the date.

Q. In December? A. Yes, sir, in December.

Q. What time was it you were up there in 1900 and 1901?

A. I believe I went up there during the winter—I

(Testimony of John Perelle.)

don't know—December; something like that.

Q. In the winter? A. Yes, sir. [262]

Q. What did you do in 1908, December?

A. I did the same thing—I stripped the surface.

Q. And built a trail? A. Open cut.

Q. Did you build any trails in 1908?

A. No, sir, no trail.

Q. How much snow was there on the ground?

A. Not a bit.

Q. No snow at all? A. No, sir.

Q. December, 1908?

A. Yes, sir—there was no snow there at the time I did the work there.

Q. Where did you do the work in 1908?

A. About 300 feet from the edge of the bank, at that gulch you see there.

Q. Which side of the creek?

A. The right-hand side, going up.

Q. Is that cut there now?

A. Yes, sir, I think so; I have never been up there since, but I could see it from the road.

Q. Did you get underground at all?

A. No, we didn't try to get underground.

Q. Did you do any blasting? A. Yes, sir.

Q. You can see the cut there now if you go there?

A. I suppose so.

Q. You left a big enough hole so you could probably see it?

A. I haven't been up there since, but I could see it from the road going up the Basin. I could see the cut there.

(Testimony of John Perelle.)

Q. In 1901, was there any snow up there then, when you did this [263] other work in 1901?

A. At the time I done the work—no, there was no snow.

Q. You said you were up there in December?

A. Yes, sir.

Q. No snow in December, 1901?

A. No, it was an open winter—there was no snow.

Q. The winter of 1900 was the winter when the Topeka was wrecked, early in December, on Sullivan Island, wasn't it? A. I don't know.

Q. Don't you know that the winter of 1900 was one of the hardest, heaviest and most covered winters, so far as snow was concerned, we have ever had here?

A. Well, I don't know anything about it, but I know there was no snow there.

Witness excused. [264]

[Testimony of Dominick Caesar, for Plaintiff.]

DOMINICK CAESAR, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. You know John Perelle, who just testified in this case? A. Yes, sir.

Q. Are you the man that was up there with Perelle in 1908? A. Yes.

Q. Doing some work for Mr. Ebner? A. Yes.

Q. How many days did you work with Johnny up there? A. Ten days.

(Testimony of Dominick Caesar.)

Q. What were you and Johnny doing?

A. Well, we were doing some open cut there and cutting square the surface there?

Q. You did some open cut? A. Yes, sir.

Q. And squared the surface? A. Yes, sir.

Q. You didn't make any agreement with Mr. Ebner?

A. I didn't make any agreement with Mr. Ebner, no. Johnny Perelle got charge of that and I went up with him.

Q. And you worked at the same place Johnny was working? A. Yes, sir.

Judge WINN.—That is all.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. What time was this? A. December, 1908.

Q. What time in December?

A. I don't remember the date.

Q. 1908? [265] A. 1908, yes.

Q. Did you find anybody else up there doing assessment work on claims around there?

A. Not where we were working—not in that place.

Q. Do you know anybody that was doing assessment work around there at that time?

A. No, I don't know anything about that.

Q. Have nice weather while you were there?

A. Yes, had pretty fine weather.

Q. It wasn't bad weather? A. No.

Q. No ice or snow?

A. No, there was no snow at all.

Q. No ice—was the creek frozen?

(Testimony of Dominick Caesar.)

A. No, the creek was not quite frozen. It was sloppy, but it was not froze.

Q. What did you take with you when you went up there? A. Got \$3.50 a day.

Q. What did you take with you went you went up there?

A. We went up to Mr. Ebner's place and took the tools up.

Q. What tools did you take?

A. Pick and shovel and drill-hammer, drill and hammer.

Q. How many feet did you make with that drill and hammer? A. I don't remember exactly.

Q. (By Judge WINN.) You went ten full days, did you? A. Yes, ten full days.

Witness excused. [266]

[Testimony of Oscar Harri, for Plaintiff.]

OSCAR HARRI, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Your name is Oscar Harri? A. Yes, sir.

Q. You are a native of what country?

A. Finland.

Q. Do you know Mr. Ebner here?

A. Yes, sir.

Q. How long have you known him?

A. Since 1893-1903, I mean.

Q. You know where the Ebner mill is up there on Gold Creek too, don't you? A. Yes, sir.

(Testimony of Oscar Harri.)

Q. You have been in the employ of Mr. Ebner or the Ebner Gold Mining Company up there at that mill quite a little bit, haven't you?

A. Since 1903.

Q. What were you doing, if anything, up there at the mill in 1903, 1904 and 1905?

A. In 1903 I was working in the mine; in 1904 I was running the compressor and in 1905 I was on the compressor, and in 1906—

Q. The mill closed down in the latter part of 1906 or the first part of 1907, didn't it? A. Yes, sir.

Q. Now, I will ask you if you know where the Parish lode claim is up there, the ground they call the Parish lode claim. A. Yes, sir.

Q. I will ask you if in 1907 you did any assessment work up there for Mr. Ebner or the Ebner Gold Mining Company? [267] A. Yes, I did.

Q. Just state in your own way, and take it slow, and tell the Court what work you did on the Parish lode claim #2 in 1907.

A. In 1907 I went there and built a ditch from the Snowslide Gulch and have water running through that ditch—

Q. You got water out of a dam up there at Snowslide Gulch? A. Yes, up at Snowslide Gulch.

Q. And you took it down out of the dam—how far did you run it? Did you run it through a tunnel or flume or was it a ditch? A. A ditch.

Q. What did you do with that water, what was it for?

A. I was using it to sluice the dirt from that big

(Testimony of Oscar Harri.)

pit—what they call the Borean pit.

Q. Sluicing off the gravel?

A. Sluicing off the gravel.

Q. What were you doing that for?

A. To discover the bedrock.

Q. What claim was it you were doing the sluicing on? A. I think that was on Parish #2.

Q. That is some of the work you did. What other work—did you do all sluicing, or did you do something else?

A. I was cutting the brush the same spring.

Q. Cutting the brush off the ground?

A. Around that pit, and when I built the ditch, I was cutting the brush off from that.

Q. Did you dig a ditch, did you say?

A. Yes, sir, and fixed that dam in the Snowslide Gulch.

Q. Did anybody else help you do any work in 1907?

A. In 1907 Mr. Ebner hired somebody else to help me, but I [268] forget who it was.

Q. You have forgotten who it was?

A. Yes, sir.

Q. Do you remember about how long you worked there in 1907 on this Parish #2 claim doing this work you have described?

A. In 1907 I think I put in over sixty days alone.

Q. Yourself? A. Yes, sir.

Q. And then you said Mr. Ebner got someone else to do some more work? A. Yes, sir.

Q. Now, in 1908 just state what, if any, work you did on this Parish #2.

(Testimony of Oscar Harri.)

A. I done the same thing, the same work,—the same kind of work.

Q. And about how many days did you work there then?

A. I worked about the same length of time, about sixty days, or a little over. I don't remember just exactly.

Q. You saw John Perelle and this other witness who just testified here? A. Yes, sir.

Q. Did you work there the same time they did or did they work after you did?

A. I worked there before they did. I started early in the spring. As soon as the snow went away I started my work and was doing it all summer.

Q. You worked there in 1907 and 1908, something over sixty days in each year? A. Yes, sir.

Q. And then Perelle and Dominick Caesar worked there in 1908? A. Yes, sir. [269]

Q. Now, did you and Mr. Ebner have any talk as to why Caesar and this other man was doing some work there?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Judge WINN.—Mr. Ebner said that this witness—that they checked over the work he did and Mr. Ebner found it was not enough.

Objection overruled. Defendant allowed an exception.

Q. Did you and Mr. Ebner have any talk about Dominick Caesar and John Perelle doing some more work there?

(Testimony of Oscar Harri.)

By the COURT.—I sustain the objection to that, —I didn't understand the question.

Judge WINN.—I stated that Mr. Ebner when he was on the witness-stand testified that he checked over the work with Harri in 1908, and it appeared that he hadn't done a sufficient amount, and went and had these other two men come up, and I ask him now whether he and Mr. Ebner did check over the work which he himself did.

By the COURT.—You may ask him that, and then ask if Mr. Ebner found it sufficient.

Defendant allowed an exception to the ruling of the Court.

Q. Did you and Mr. Ebner go over the work you had done in 1908, did you talk it over?

A. Yes, sir.

Q. What did you find out,—did you find out that you had done enough?

A. Mr. Ebner took me down there and saw what I was doing, and I gave him the number of days I was working there and he said he would have to hire somebody else to do some more work on it.

Q. What about 1907? Did he check your work over? [270]

A. He did just the same thing?

Mr. SHACKLEFORD.—We object to that.

Objection overruled.

Defendant allowed an exception.

Q. You know Mr. Tripp, don't you?

A. Yes, sir.

Q. Do you know about what time Mr. Tripp went

(Testimony of Oscar Harri.)

up on the Ebner property and was a kind of boss or superintendent? In 1909—do you remember about the time that Mr. Tripp went up there?

A. It was somewhere in the middle of August, I think.

Q. Now, I will ask you if before Mr. Tripp went up there in 1909 you had done any work on this Parish lode #2? A. I had.

Q. What kind of work were you doing?

A. I was doing the same kind of work as I done before.

Q. Do you remember about how long you worked before Mr. Tripp came up and took charge,—about how many days?

A. I put in about twenty-five or thirty days,—I am not sure which.

Q. You put in 25 or 30 days,—do you mean working on this Parish lode #2?

Objected to as leading—sustained.

Q. What were you doing these twenty-five or thirty days before Mr. Tripp came up?

A. I done the same thing I did before. I built up that dam and had the water running through the property and sluicing.

Q. What claim was that on?

A. That was on Parish #2, I think.

Q. Where did you get the water?

A. From Snowslide Gulch. [271]

Q. Is there a dam in there, in that place up there, that you took the water out of? A. Yes, sir.

Q. Did you do any work on the dam that year?

(Testimony of Oscar Harri.)

A. Yes, it has to be rebuilt very often.

Q. Now, after Mr. Tripp went up there some time in August, did you do any work for Mr. Tripp?

A. Yes, sir.

Q. Did you do any work on the Parish lode #2 under Mr. Tripp's instructions while you were working for him?

A. We were working on the left-hand side of the creek. I don't know which claim that is on.

Q. Maybe you can tell about where it is—this other work that you speak about that you did on the Parish lode claim, is on which side of the creek as you come up the creek? A. On the right-hand side.

Q. Now, you came over and after Mr. Tripp took charge of the work, that is, in 1909, you say you did some work on the left-hand side of the creek?

A. Yes, sir.

Q. You don't know whether that was on the Parish lode claim or not?

A. I know it was on the Parish claim but I don't know which one,—1 or 2.

Q. But it is on the left-hand side of the creek as you go up the creek? A. Yes, sir.

Q. And the same side the wagon road is on?

A. Yes, sir. [272]

Q. Just tell about what work you did under Mr. Tripp on that side of the creek and about how long you worked on it.

A. We built that road; there was a slide and the road was all filled up and we built that road and we put in a tramway also and put in a compressor—that

(Testimony of Oscar Harri.)

is the road that leads from the wagon road down to the compressor.

Q. Why did you have to rebuild it—did you rebuild it or make a new road?

A. We had to rebuild it; there was a big slide took it away and we had to take that all out.

Q. Where did you put in a tram?

A. From the creek bank over to the compressor.

Q. From the creek bank over to the compressor-house? A. Yes, sir.

Q. Then, when Mr. Tripp was there in 1909, did you go back over on the right-hand side of the creek and do any work yourself?

A. No, I did not; he had another man there.

Mr. SHACKLEFORD.—We move to strike the latter part of the answer.

By the COURT.—The objection will be overruled—the presumption is he states it of his own knowledge.

Defendant allowed an exception.

Q. Did you see Mr. Tripp have some more men at work on the Parish lode #2? A. Yes, sir.

Q. In 1907, did I understand you to say you worked there alone for a while yourself, and then do you know who the other men were that Mr. Ebner got to do the work there that year?

A. I could not remember, but I think it was a fellow named John Sawney. [273]

Q. Do you know where John Sawney is now?

A. I think he is around Sitka somewhere,—I haven't heard from him.

Judge WINN.—That is all.

(Testimony of Oscar Harri.)

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. How long have you lived up in this country?

A. About nine years. You mean Alaska?

Q. Yes. A. About nine years.

Q. Working for Mr. Ebner all the time?

A. No, since 1903.

Q. Where did you work before that?

A. I was out fishing.

Q. Did you ever do any mining before you came here? A. No, sir.

Q. Did you ever do any work on any other of the claims up there except the Parish?

A. Assessment work?

Q. Yes. A. No.

Q. You never did any work on the Cape Horn?

A. No.

Q. Now, what did you understand—when you told him you did work on the Parish, what do you understand you were working on? When you were sent up there to work on the Parish lode, you were sent up there to work on both the Parish claims?

A. Mr. Ebner took me down there and took me to the place to work and I was working there in the place where he told me.

Q. You don't know where you worked?

A. It was Parish #2. [274]

Q. You never did work on the Parish #1—the claim up the hill, above that?

A. I was cutting the ditch and bridge on that claim, I guess.

(Testimony of Oscar Harri.)

Q. You were doing the assessment work on both claims, were you not? A. I guess I did, yes, sir.

Q. And you went over to Snowslide Gulch and found an old dam there? A. Yes, sir.

Q. Had to fix that up a little?

A. It was mostly all gone,—I had to rebuild it.

Q. That wasn't on the Parish?

A. I don't know.

Q. Then, you turned the water over into some ditches that had been there before?

A. I guess they had been there before.

Q. You guess they had—you found them there, didn't you?

A. Yes, but they had to be opened up.

Q. And you turned them down here to the old placer pit they call the Borean pit?

A. Yes, sir.

Q. And you let the water run through that ground? A. Yes, sir.

Q. You didn't have any giant or any hose?

A. No.

Q. You didn't impound the water so as to have any pressure on it. A. No, sir.

Q. But you just turned the water of that creek over into the Parish, so it would run over the two Parish claims? A. Yes, sir. [275]

Q. And so it would run into the Borean pit?

A. Yes, sir.

Q. You had some sluice-boxes in the Borean pit?

A. No.

Q. Did you have a rocker there? A. No.

(Testimony of Oscar Harri.)

Q. Never had a rocker there? A. No.

Q. Did you have any boxes there at all?

A. They had old boxes there, but I didn't have any.

Q. There were boxes there? A. Yes, sir.

Q. Did you use them? A. No.

Q. You didn't use them at all? A. No.

Q. You didn't put a rocker up there? A. No.

Q. And you trimmed the brush away from those old ditches? A. Yes, sir.

Q. In those old ditches had the brush grown up so that you had to cut from the middle of the ditch or just from the sides of the ditch?

A. It was just over the sides of the ditch.

Q. And that was the work you did in 1907 and 1908? A. Yes, sir.

Q. Who did you say was with you in 1907?

A. There was nobody with me, but after I done my work, there was somebody sent there, afterwards.

Q. Now, nobody did any placer mining while you were up there? [276]

A. Not in that pit, that I know of.

Q. Well, on that ground, with you, there?

A. I don't think so.

Q. You don't know where the line that divides the Parish #1 from the Parish #2 is, do you?

A. No, not exactly; I ain't sure.

Q. But that place where you were working was pretty well up the hill on the claim, wasn't it?

A. It wasn't very far.

Q. It was above that bench on the creek?

(Testimony of Oscar Harri.)

A. Yes, sir.

Q. There was a bench up there? A. Yes.

Q. The only thing you did was to see that the water ran in there and ran over the ground,—turn the water in and see it ran over the ground?

A. No, I wasn't looking at the water running. I had tools with me and was using the tools.

Q. What tools did you have with you?

A. Pick and shovel.

Q. Shoveling gravel? A. Yes, sir.

Q. Did you say that there was anybody with you in 1907? A. Not with me, but afterwards.

Q. You were not there when he was? A. No.

Q. When you went back there in 1908 had the appearance of that place changed very much—did you notice any change in it?

A. No, not in the spring when I worked there.

Q. That is where Mr. Ebner told you to go to work? A. Yes, sir. [277]

Q. Now, I understand you to say that you did some work up in that pit again in 1909? A. Yes.

Q. You did that for Mr. Tripp? A. Yes, sir.

Q. The same sort of work? A. The same thing.

Q. Did you have a rocker up there in 1909?

A. No, sir.

Q. And you did some work there over on the other side of the creek? A. Yes, sir.

Q. In 1909, who did you do that work for?

A. What is that?

Q. You did some other work besides the work in the Borean pit? A. Yes, sir, in 1909.

(Testimony of Oscar Harri.)

Q. Did you do that for Mr. Tripp? A. Yes, sir.

Q. The work you did in the pit you did for Mr. Ebner?

A. I guess I did—he is the man that told me.

Q. It was before Mr. Tripp came and took the property? A. It was, yes, sir.

Q. The work that you did for Mr. Tripp is on the old road that leads down from the basin road across the Parish claim to the compressor plant?

A. I think there has been an old road there.

Q. May have been there for some time?

A. Yes.

Q. That was the road that was evidently put there to carry stuff over to the compressor when it was built?

A. I suppose that is what it was there for. [278]

Q. And you repaired that road from the Basin road down to the stairway and repaired the stairway which leads across to the compressor plant?

A. Yes.

Q. What has been your position up at the Ebner mine?

A. In 1903 I was working in the mine, and in 1903, '04 and '05 and '06 was on the compressor.

Q. From that time on, what has been your work.

A. From that time, since the mill shut down, I have been there as a watchman.

Mr. SHACKLEFORD.—That is all.

By Judge WINN.—You told Mr. Shackelford that you were watchman up there. What did you watch, —what did you mean by being watchman?

(Testimony of Oscar Harri.)

A. Of the Ebner property.

Witness excused. [279]

**[Testimony of William M. Ebner, for Plaintiff
(Recalled).]**

WILLIAM M. EBNER, recalled.

(By Judge WINN.)

Q. I will ask you, Mr. Ebner, if you have ever seen any corner posts or stakes on the northwesterly end line of the Lotta, Taku lode, Keystone lode, Crown Point lode and Golden Fleece mining claims, etc.

* * *

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. Do you know where the intake of the Jualpa high line flume is on this ground?

A. Yes, I know very close.

Q. It is on the Lotta?

A. It is on the Lotta—I know about where it is. I have not looked for it on that map. I know about where it is. I can point it out approximately on the map.

Q. When was that high line flume placed on the Lotta?

Objected to as not proper cross-examination. Objection overruled.

A. I think that was in 1897. I wouldn't be sure.

Q. It was 1897 or 8? A. I wouldn't be sure.

Q. And it was not placed there with your consent?

A. No, sir.

Q. Now, I am going to ask leave of the Court to allow me to present you with these books, which I

(Testimony of William M. Ebner.)

did not have a chance to examine the other day, and ask you if it is not a fact that along about the 31st of January—

Judge WINN.—We object as not proper cross-examination.

By the COURT.—You may reopen your cross-examination for this purpose, as far as I can judge now. [280]

Q. About January 31, 1901, you started an assessment work account for the Parish lodes?

A. Yes, I think so.

Q. I will show you the book and that account—I hand you the book marked Ledger, page 99, and ask you if that account does not include the work on Parish #1 and 2 both?

By the COURT.—Better have the book identified now.

Page 99 of the book is marked Defendant's Exhibit #8.

Judge WINN.—Now, I move to strike out the question about the Jualpa high line flume—I don't see what figure it cuts.

Mr. SHACKLEFORD.—I think we will be able to develop the purpose in the argument.

Motion denied: Plaintiff allowed an exception.

The WITNESS.—What did you want to know?

Q. You say that that account represents the assessment work on both the Parish #1 and 2?

A. Not for the years given in the beginning it does not.

(Testimony of William M. Ebner.)

Q. From the time the account was started it does, don't it?

A. It does, yes, from the time the account was started until the account was ended it does.

Q. And it represents one claim just as much as the other?

A. Yes, both of them, Number 1 and 2.

Q. Now, then on the 22d of October, 1905, there is an entry \$368.55, development?

A. Yes, sir—development was credited and Parish lode was charged; yes, sir.

Q. And on the same day, having done about \$700 worth of work on the account, on the two lodes, you made a transfer from another account of \$1055.

A. Yes, sir.

Q. Now, I am going to ask you to turn to your journal—that is [281] a charge to mining.

A. Yes, that is right.

Q. And show me the items in the mining account—I don't mean in your journal entry, of this transfer, but show me back to the entries in your mining account, that you picked out of that mining account, to make that item of \$1055?

A. I will explain this. In these small items you will find either powder or some individuals that were not employed by the company, that is, their accounts here were kept by the foreman,—he kept the time, he kept a record on his time book, of the number of days that each man worked there, for each year, and it was not charged to the Parish lode, it was charged to mining, the development work, for

(Testimony of William M. Ebner.)

several years, until we finally concluded that it was better to segregate it, so we went over the time-books and segregated it and credited to mining what belonged to the Parish lode and credited to development work what actually belonged to the Parish lode, what work was performed there.

Q. I want you to trace back the books and trace those items back to where they came from?

A. It is impossible to find that from here because I had my bookkeeper, whoever he was—I don't know whose handwriting that is—go over the time-books and find the days, the number of days that have been charged to mining and been charged to development.

Q. You didn't go over them yourself?

A. Not altogether, no. I gave him instructions what to do. I said, "You segregate them."

Q. Now, Mr. Ebner, the time-books, the pay-rolls and all the original data of the Ebner Company have been lost?

A. No, they have not been lost, but I can't find them just now— [282] some of them were boxed and shipped to where I live now. This stuff was put in the vault and some of it may have gotten lost after the thing was audited and these things were passed—and with the large accumulation of papers and the old ones, why some of those may have been lost.

Q. The Ebner corporation up to the time the California & Nevada took an interest in the matter was a close corporation?

Judge WINN.—We object to that—there is no evi-

(Testimony of William M. Ebner.)

dence about the California & Nevada taking charge.

Objection overruled. Plaintiff excepts. Exception allowed.

Q. The Ebner Company up to the time Mr. Tripp came up here had been a close corporation?

A. What do you mean by a close corporation?

Q. I mean it had been under your control all the time. A. To a certain extent.

Q. There are two other gentlemen interested with you? A. Yes, sir.

Q. Mr. Young and Mr. Behrends?

A. Yes, sir—more than that.

Q. And a scattering of stockholders who live in Boston? A. Yes, sir.

Q. Has Mr. Behrends or Mr. Young or the stockholders in Boston ever audited your accounts?

Judge WINN.—We object as incompetent, irrelevant and immaterial—Mr. Shackleford has introduced these books of account and he is bound by them.

Objection overruled. Plaintiff allowed an exception.

A. The Board of Directors audited the books,—that is Behrends and Young—

Q. Audited the books? A. Yes, sir. [283]

Q. And when you referred to the account being audited—was the auditing made under your direction? A. Not altogether; no.

Q. What about your vouchers?

A. Those are boxed up. I don't know whether we have all the old vouchers or not,—most of them, I guess.

(Testimony of William M. Ebner.)

Q. You never kept a day-book?

A. You mean a blotter? No, we never kept a blotter.

Q. So your original entries are on your pay-roll?

A. We had just so many accounts and then when we adopted the system of copying our pay-roll into the journal, why from that time on. Before that we would make out our pay-sheet—we had a pay-sheet and charged off the pay-sheet.

Q. When did you adopt that system?

A. What system is that?

Judge WINN.—We object to this as improper cross-examination. If he is making the witness his own—he cannot offer a set of books and then impeach them; it is incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

Q. When did you adopt the system of extending your pay-roll in your journal?

A. I don't remember. Somewhere about 1903 or 4; somewheres along there; the pay-roll account will show when it was started.

Q. Look at that—

A. It was started in February, 1903.

Q. (Continuing.). And tell me where these items came from that made up the \$1,053?

A. The assessment work there was not carried on to the pay-roll, as I testified here once before,—in other words, it was all [284] charged to mining on the pay-rolls.

Q. So when the segregation was made, it was more

(Testimony of William M. Ebner.)

or less of a guess?

A. No, it was made very carefully from the time-book.

Q. From the time-book?

A. Yes, sir, because the foreman, when he had a man working there, for instance—he had an account and under each man's name was a line or two, so when he put him on some other work, he would note it on the time-book.

Q. That was done by Mr. Waldo Hart?

A. I think so—not altogether. I helped to work on the time-books.

Q. What about the time-books—do you know where they are? A. No, sir, I do not.

Q. Have you made any search for them?

A. I have.

Q. When?

A. Since I was in court, the first day.

Q. When you boxed your books, did you inventory them—do you know which you sent south and which you kept here? A. No.

Q. Where did you look for the time-book?

A. Among the papers, the rolls of papers and bundles I have in the office there.

Q. Is that in the possession of the California & Nevada Company? A. No, sir.

Q. Where is your bookkeeping after 1906?

A. We haven't any bookkeeping in those books—we haven't done any business. [285]

Q. Where is the accounts that have been kept since then, since 1906, when these books end?

(Testimony of William M. Ebner.)

A. Since those books end, there has been no books kept.

Q. No books kept? A. No, sir.

Q. Have you any vouchers?

Judge WINN.—Objected to as incompetent, irrelevant and immaterial. It is not proper cross-examination.

By the COURT.—Both sides reserved the right to use the witness later. Objection overruled. Plaintiff allowed an exception.

Q. Where is your data and accounts and vouchers or other memoranda from which your books could be made up from that time to the present?

A. I haven't any.

Mr. SHACKLEFORD.—That is all.

(By Judge WINN.)

Q. I want to ask you if you know the size of your fifteen-stamp mill that is up there on the property that you testified concerning when you were on the witness-stand before. I didn't ask you the size of it.

A. I think I know the exact length. It is 80 feet, and the width, I wouldn't be sure by two feet; it is either 32 or 34 feet wide and the same height,—32 feet.

Q. Since what year have you been acquainted with that building that you have just described?

A. Ever since 1891.

Q. Has it ever been added to or decreased in size or has it remained as it is?

A. Just the same. [286]

(Testimony of William M. Ebner.)

Q. Has there ever been on the Ebner Gold Mining Company property that is described and set forth in this exhibit "N," the Golden Fleece, Crown Point, Keystone, Taku, Lotta lode, and including the Parish #2 any other mill on these premises since the date you first mentioned?

A. No, sir; except what they call the compressor-house.

Q. I mean a stamp-mill?

A. No, not a stamp-mill.

Q. What time did you increase the number of stamps in that mill from ten to fifteen—do you remember the year?

A. I think it was in 1898—no, it was later, I bought machinery but didn't put it in. I think it was in 1901. I wouldn't be sure just what time it was.

Q. Did you in adding these five extra stamps alter the mill any?

A. No, the ten stamps were set about the center of the mill and I put them one side of the ten stamps that were there—the five stamps.

(By Mr. SHACKLEFORD.)

Q. When was the compressor put in?

A. We started on that in 1897.

Q. I see a mark on here, on the lower line of the Lotta as exhibited on "N" marked "chute"—that is a stairway?

A. That was a chute and a stairway so we could slide the heavy machinery down.

Q. That is, there was a place opposite the steps?

(Testimony of William M. Ebner.)

A. Yes, alongside the stairway there was a side chute built of heavy timbers and planks, by which we could lower the machinery. [287]

Q. That is connected with a spur that runs by the Basin road?

A. Yes, it was, at that time the road was built there.

Q. So as to assist in building the compressor?

A. Yes, sir.

Q. There has been a vanner-room and wheel-house added to the Ebner stamp-mill within the last ten years? A. No, sir.

Q. Never has been?

A. No, sir, there was not; that is the way the mill was built; the mill originally consisted of ten stamps and four frue vanners, rock-breaker and water-wheels, with a water transmission—with a water-wheel way down on the creek.

Q. This cabin near Corner #5 of the Lotta, was that there when you first saw that corner?

A. Yes, sir; that was there when I first saw it, but I understand it was just built there—it was near Snowslide Gulch and it was built there the year before I came into the country.

Q. It is in the same position now it was then?

A. Yes, sir; it is in the same position now it was then.

Q. But it was not part of the improvements in connection with the Lotta lode?

A. I don't think so, because the man had previously occupied the house a little further up the hill

(Testimony of William M. Ebner.)

from there, towards Snowslide Gulch, as I understand. I don't know positively about that, but it was there when I first came to the country.

(By Judge WINN.)

Q. Mr. Shackleford asked you some questions about the Jualpa high line flume—if you opposed the Jualpa Co. taking water [288] from there, how did you finally settle that matter with the Jualpa Company?

Objected to as incompetent, irrelevant and immaterial. Objection overruled. Defendant allowed an exception.

A. We settled that by their buying a certain amount.

Q. You had some paper written about it, didn't you? A. Yes, sir.

Q. And you finally granted them permission to go across the Lotta claim and take the water?

A. Gave them the right of way, yes, sir.

(By Mr. SHACKLEFORD.)

Q. And they also crossed your Cape Horn lode?

A. Yes, sir.

Q. Was that money paid to you or the Ebner Gold Mining Co.?

A. The Ebner Gold Mining Co.—look on page 99,—you will see the charge.

Q. The full amount was paid to them?

A. No, sir.

Q. This—Last Chance Gold Mining Co. property and plant, \$5,000 June 30th W. M. Ebner \$5,000—that was not the full amount?

(Testimony of William M. Ebner.)

A. That was not the full amount; no, sir.

Mr. SHACKLEFORD.—I am going to offer page 99 of the Ledger in connection with the cross-examination of the witness. We offer page 99 of the Ledger.

It is admitted.

Witness excused. [289]

[Testimony of H. T. Tripp, for Plaintiff.]

H. T. TRIPP, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your name? A. H. T. Tripp.

Q. How long have you lived in Alaska?

A. Since 1897.

Q. What business have you been engaged in the principal part of the time you have been in Alaska?

A. Mining.

Q. In what capacity have you been engaged in the mining business, at various times, during that period in Alaska?

A. Well, mine manager and looking after mines—trying to find mines, etc.

Q. You have also been superintendent and conducted the operation of mines?

A. Yes, sir; that is what I came here for first.

Q. How long were you engaged in actively running a mine in Alaska at one time,—that is, where you were milling ore? A. Seven or eight years.

Q. And during that time did you have quite a

(Testimony of H. T. Tripp.)

number of men employed under you?

A. Yes, sir.

Q. Now, Mr. Tripp, you are acquainted with the property that is known as the Ebner Gold Mining Co. property, that is, you have a kind of general acquaintance with the property, haven't you, as a property? A. Yes, sir.

Q. You have been on that property quite a little bit, off and [290] on, for these last few years?

A. I have.

Q. Been on there in various capacities?

A. Yes, sir.

Q. You consequently are pretty well acquainted with it as a property, that is, in a general way?

A. Yes, sir.

Q. Now, Mr. Tripp, you know the young fellow I had on the witness-stand a while ago, Oscar Harri?

A. I do.

Q. You had control of some work that was going on, did you not, on this property, in the year 1909?

A. I did.

Q. Do you know where the two Parish lode claims are, Number 1 and 2?

A. I know pretty nearly where they are; yes.

Q. Prior to the year 1909 and in the year 1908, you heard Mr. Ebner and some of the witnesses testify here that you were with a party of persons that brushed out some line along on one of the lode claims belonging to the Ebner group of mines?

A. Yes, sir.

Q. You are the same H. T. Tripp? A. I am.

(Testimony of H. T. Tripp.)

Q. Now, I will refer you to this exhibit which we have offered in evidence, called "N," and just indicate to the Court there what you did in regard to the brushing out of some line there, in company with Mr. Ebner, I believe, and Mr. Wettrick and who else was along—Mr. Hill?

A. Wettrick, Hill and Oscar Harri and, I believe, a man named [291] Kirk was along.

Q. Now, if you will step over to this exhibit and point out so it can go into the record—show what line you brushed out there.

A. I took Wettrick and Hill and went up with them to the Ebner mine, and we came down an old road, if I remember right, because it was not convenient to go up the other way—I can't remember distinctly that we went that way, but I think we did—that is an impression—and when we came down the road we commenced measuring around and looking into the brush and underbrush for a certain stake that was going to be the starting point, and after considerable measuring and looking around, why we got on to the old ax marks and brushed our way up and found a stake that I suppose that this represents in fact. I know in all line of common sense that that was the place we found, that is in conformity with all the rest of the lines.

Q. That is you mean—

A. The line which is the southwest corner of the Lotta, I think—that is the way I read it; I believe you call it #5.

(Testimony of H. T. Tripp.)

* * * * *

Q. I thought you said a while ago that you found a stake there?

A. We found a stake over here at #5.

Q. The way you are giving your testimony I gathered you did not find a stake at the old cabin?

A. Yes, sir; that was the starting-point.

Q. Did you or did you not reset that stake at 5?

A. We put another stake down but there were two or three stakes there. I remember there was a bunch of stakes and I think some old wire or nail or something of that kind [292] that fastened one stake to another; that is all I remember—I believe I made a mistake. I think we brushed out a line down to the creek first or we went over along a line that was sighted to from some point or flag or stake that we put over here on the road.

Q. Across the creek?

A. Across the creek on the wagon road going to the Basin—I remember that distinctly because I found that stake and cut the brush.

Q. You say you found that stake?

A. I found a stake setting on the road and cut the brush from around it myself, so that it could be seen from across the creek.

Q. Is that the same stake you have heard some of the other witnesses testify to here?

A. That is the stake marked.

Q. W C 2, marked W C 2? A. Yes, sir.

Q. What purports to be on the boundary line between the Parish lode #1 and the Lotta lode?

(Testimony of H. T. Tripp.)

A. Yes, sir.

Q. On this map? A. Yes, sir.

Q. That stake was there?

A. That stake was there.

Q. Did that end up your work when you were up there at that time?

A. No, we went along over, as I said, and set a stake on the corner of the Parish and then we brushed a line out which would be the southwesterly end line— [293]

Q. Southeasterly—

A. I don't know. It is the line between the Parish #1 and 2, I suppose, and we crossed over a cut and went over some very bad ground there, that is, very brushy ground and went down over the hill and found—I don't know whether we found a post there or not. I can't remember that we did find a post there—and then we turned a corner and brushed out over another parallel line to the one we had brushed out before to cut around the Parish ground and when we got down into that—that was as far as the creek line that we did our brushing.

Q. You went down, then, what you are indicating on the map as the southwesterly side line of the Parish lode #2?

A. Yes, the southwesterly side line of the Parish from the corner of—I can't see; I can't tell what corner that is.

Q. That is corner #4, being the southwesterly corner of Parish #2.

A. Anyway, we brushed out the line over to the

(Testimony of H. T. Tripp.)

creek, supposed to be on that line—I think it was—and from that point we traversed across the creek and down over the Snowslide and around into Jualpa Basin and up the creek a ways and from that on, I don't remember—I wasn't with them all the time; they did all the work. I was with them another day when they did some more work down below,—that is practically all in regard to that—I wasn't with them when they established these other corners up here.

Q. That about finished up your trip with them?

A. Yes, sir.

Q. That was in 1908? A. Yes, sir. [294]

Q. In 1909 you put in quite a little bit of time up there on that property doing various things?

A. Yes, sir.

Q. Just state generally what you were doing up there.

A. Well, I was there more or less during July—on the 18th day of August I practically took charge of everything up there.

Q. Was this young fellow Oscar Harri up there when you went up in August? A. Yes, sir.

Q. He had been there as watchman, had he not, prior to your going up there in August?

A. Yes, sir.

Q. And when you took charge there in 1909, in August, state in a general way what work you did up there; that is, I don't mean particularly the direct work that was done on the two Parish claims, but state in a general way what work you did. I

(Testimony of H. T. Tripp.)

am not referring to any particular work on the Parish claims, but generally what work were you doing?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. My work was from the top of Mount Juneau. clear along the lode line and as far as the joining of the Juneau-Alaska ground.

Q. In fact, you were doing work during that summer and fall over about all of what is known as the Ebner group of claims and also on the Cape Horn lode claim, of course including the two Parish lode claims? A. Yes, sir.

Q. Did you have anybody in your employ and employing any other [295] men to aid and assist you in your work that you were doing there?

A. I had several men there.

Q. About how many?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial

Objection overruled. Defendant allowed an exception.

A. I could count up on the time-book how many I had,—seven or eight or nine men, I don't know. At different times I had more.

Q. Did you have Mr. Wallenberg, a mining engineer, also in your service?

A. I had a man named Wallenberg, yes, sir.

Q. A civil and mining engineer?

(Testimony of H. T. Tripp.)

A. I had him, yes.

Q. What work generally was he doing up there?

A. He did the assaying and mapping or anything in that line.

Q. What do you mean by mapping?

A. Well, I mean wherever I found any values around on the ground I had him map it in and do that kind of work; that was my purpose, to try to find values at any place on the property.

Q. You had quite an extensive topographical survey made by Mr. Wallenberg? A. I started to.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

Q. He was engaged in your service up there how long?

A. Well, he was—from the time he started to work—he was in my service before I took charge of the Ebner mine for a couple of months, that is, before I had the property [296] turned over in my care, before I had the keys to the property.

Q. You said you did considerable surveying, topographical surveying and also assaying,—I will ask you to state to the Court what was your object in going up over this property and having this topographical survey made and also making the test of the values at different points, etc., on this property,—what were you doing it for?

Same objection. Objection overruled and exception noted.

(Testimony of H. T. Tripp.)

A. I wanted to determine any lines of value, anything that would be in the shape of lode lines or belts of country that would carry values in paying quantities.

Q. Over that entire property? A. Yes, sir.

Q. Including the Parish lode claims, too?

Objected to as leading. Objection sustained.

Mr. SHACKLEFORD.—I am now going to ask counsel for his purpose in asking the last few questions.

Judge WINN.—I will state what my purpose is. We expect to show by Mr. Tripp that he was put to work up there for the purpose of doing just exactly what he said he was doing and also he was to keep up the assessment work on the Parish lode claims and also on the Cape Horn lode claims and some other claims. We expect to show that his ultimate object in doing what he was doing—he was put on there for that purpose, to do what he testified he was doing, in order to determine the most feasible way of opening up that property as a big property; and the undertaking of building a 200-stamp mill down here, we expect to further show by Mr. Tripp that he consummated his purpose to this extent, that after he had had these surveys made and commenced testing, he got along [297] to an extent anyway that he had concluded to undertake to open up this property on a larger scale as we have pleaded and undertook to build a tunnel in about where this big tunnel is marked—Ebner mine tunnel, on this plat “N.” We expect to show further along that he undertook and

(Testimony of H. T. Tripp.)

did commence the driving of a tunnel nearby; we expect to show that that tunnel put on there was for the purpose of opening up and developing this entire property, and the tunnel would have run as started through the Parish lode claim. We expect to show in connection with that that the assessment work was done on the Parish lode claims in various ways and when we get to that, if counsel wants to object, why he can object. That is the general plan—that he went there to open up this property on a larger scale, and perhaps how it was determined by Mr. Tripp that down here was the place to build the mill and he undertook the running of that tunnel, which was just changed a little, but the tunnel they are driving now, which we will show is now over 400 feet in, would run virtually parallel and would tap the same country, and we expect to show that the work done down there is work that tended to open and develop the entire property, a lot of it, and tended to do the assessment work on the Parish lode claims, altho we will show how much was done on these claims outside of what Harri has testified he did.

Mr. SHACKLEFORD.—It is conceded in this case that counsel dismissed a suit on the Cape Horn lode,—the work starting on the Cape Horn extension here shows it out of contiguity with the rest of the claims. The further objection to the testimony—simple reconnaissance work under no circumstances [298] is assessment work. We contend that reconnaissance work cannot be introduced in his case

(Testimony of H. T. Tripp.)

in chief, unsegregated reconnaissance work, upon the whole series.

Objection overruled at this time. Defendant allowed an exception.

Q. I will ask you if this topographical survey you had extended over the entire Ebner property. You know what is meant by the Ebner property. It means the patented property and the two Parish lode claims,—you understand that?

Objected to as leading. Objection sustained.

Q. Now, Mr. Tripp, I will ask you to state to the Court just what mining claims in this Ebner group that this topographical survey you were making and the sampling extended over, up to the time you quit the work.

A. The work of sampling—very little was done on the claim called the Crown Point claim, very little, but the Taku lode and perhaps the Keystone—no, the Taku lode, I think, had the most of the work done on it, that is, in the shape of getting it blocked out in squares and the assays—I got returns from the assays from the cuts and various places and openings I made.

Q. As I understand, then—

A. It might perhaps, some of it, be on the Lotta. I know it was.

Q. You know where the Lotta was?

A. Yes, I do.

Q. You know where the boundaries are?

A. When it comes to the boundary lines on the brush and steep sidehills, it is impossible to tell

(Testimony of H. T. Tripp.)

where you are.

Q. You did some cutting—did you find these samples right on top of the ground? [299]

A. No, we generally found something to indicate, something to start us digging there, from a line or something else we had, or something that was cropping out; from the indications, from having values in one place, they would probably be in another.

Q. You were doing what you might term general prospecting work?

A. Yes, sir, that is what I was doing.

Q. You are a mining man?

A. That is my business.

Whereupon court adjourned until to-morrow (Saturday), May 27, 1911, at 10 o'clock A. M.

May 27, 1911—Morning Session.

Continuation of the direct examination of Mr. TRIPP.

(By Judge WINN.)

Q. Mr. Tripp, you are sufficiently well acquainted with this Ebner property, including the Parish lode claim #2, to know approximately where the boundaries of that claim are, are you not?

A. Yes, I am.

Q. Now, you were speaking yesterday about having contour lines made and that you had Mr. Wallenberg go over this property with you and make some sort of a survey. What was your purpose in having this work done by Mr. Wallenberg?

A. Well, my purpose was to determine where to

(Testimony of H. T. Tripp.)

put a mill, where to locate a mill for the benefit of all of the Ebner property, and consequently if I found the right place to put a mill, to drive a tunnel, a working tunnel, for the benefit of all the property.

Q. You know where the little mill, the 15-stamp mill of Mr. Ebner's is, the old mill up there? [300]

A. I do; yes, sir.

Q. Now, was this work of yours done with the expectation or intention or purpose of mining this property and milling its ore through this mill of Ebner's or for some other purpose?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant, immaterial.

Objection overruled. Defendant allowed an exception.

A. My intention was to locate a tunnel for the benefit of the property, where I would have ore overhead. I was looking for values and the place to mine for ore.

Q. Was your work there with the expectation of building a mill at the upper end of the property or the lower end of the property?

A. I calculated to go below the ore.

Q. Then, you would have to come down the creek to do it?

A. I never had any intention of having a mill erected anywhere above or in the neighborhood of the water-power, or on a level with the water-power, or anywhere around the neighborhood of the old mill; no, sir.

Q. Now, I will ask you as a mining man in pros-

(Testimony of H. T. Tripp.)

pecting surface and ore bodies, etc., if that is any aid or assistance or guide to you in indicating to you where a tunnel should be opened for the purpose of developing a mining property?

Same objection. Objection overruled. Defendant allowed an exception.

A. Certainly it is.

Q. Now, I will ask you, aside from this contour work you had Mr. Wallenberg doing, what other work, if any, did you do towards prospecting that property, in order to ascertain [301] where the best place would be to run a tunnel for the opening up and mining of the property—what did you do yourself?

Same objection. Objection overruled. Defendant allowed an exception.

A. The whole property, do you mean?

Q. Yes, the whole property, and I wish you would get down particularly, also, to the Parish #2, but tell generally what you did with the whole property.

A. Well, I did work all over the property,—that would be over the Parish and on the Parish #2, and I crosscut and sampled and assayed all over the side of the hill through which a tunnel might be driven if it went directly into the main lead of the Ebner mine, the main dyke called the Ebner mine dyke, to get to the proper place for the commencement of the work, and if the tunnel ran directly under this work, why it would go under the most values—that was my idea in that.

Q. And that was the purpose of your work there?

(Testimony of H. T. Tripp.)

A. That was what I was there for. I was left there to choose a place for the mill and open the mine—that was my business on the property.

Q. About how much work did you say you did upon this Parish #2 claim, in the work you have just indicated you had been doing?

Mr. SHACKLEFORD.—We object to that—reconnaissance work in the way of sampling is never considered as assessment work.

By the COURT.—This question may be answered.

Q. Tell what kind of work you yourself did on this Parish #2 lode claim during that year, leaving out any other work done by Mr. Wallenberg or any one else—but what kind of [302] work were you doing on that Parish #2?

A. I was all over that ground looking for something of value to determine the best way to open the whole property and to drive a tunnel that would go underneath it,—to get the proper direction for the main working tunnel, for the whole property.

Q. Did you have at any time anyone with you on the Parish #2?

Objection overruled. Defendant excepts.

A. Yes, I had men with me most all the time.

Q. Did you do anything else in regard to working on the Parish #2 except looking it over—did you do any manual work there, and if so, explain it to the Court.

Same objection. Objection overruled and defendant allowed an exception.

A. That I did myself?

(Testimony of H. T. Tripp.)

Q. Or the men with you, assisting you?

A. I did work myself, as far as that is concerned.

Q. That is what I am getting at—what you did yourself.

A. My first recollection after I came down is of doing something in the shape of assessment work and that assessment work—I sent a man down there by the name of Dewey. I sent him first to clean out the ditch that came from Snowslide Gulch and he couldn't find the ditch, so I think I sent Oscar Harri down there to show him where it was, and then afterwards I went down there myself with him, and I remember very distinctly of helping him build up a dam and working with him myself.

Q. What were you building up a dam for?

A. To turn the water out of Snowslide Gulch to go through a ditch to run down on to the property—the Parish #2. [303]

Q. That is the same dam that you were referring to in your testimony, that you heard Mr. Ebner testify to on the witness-stand, the dam up there on Snowslide Gulch?

A. I don't know that I was questioned on that subject before.

Q. But I say the one Mr. Ebner testified to—you heard Mr. Ebner's statement?

A. I heard Mr. Ebner—it is the same dam that Oscar Harri testified he had the water running through before I took charge of it.

Q. Now, state to the Court about how much work was done on that grade to prepare it to divert the

(Testimony of H. T. Tripp.)

water for the purpose you have indicated.

A. Well, evidently there had been some kind of a flood down Snowslide Gulch and had taken the rocks off from a sort of falls or big rock formation that passed across the creek, on which this dam was made, and then the flood water running around the ditch, shut off or cut off the top of the ditch for probably 50 or 75 feet; besides that ditch was more or less clogged by the vegetation. How as to the amount of work, I don't remember exactly—I think probably a couple of days cleaned out that ditch and got the water down on to the ground. Besides what I did, I don't think that this man was there over two or three days before he got the water running.

Q. That is, at that particular time? A. Yes, sir.

Q. Now, you say you were there and aided in putting this dam in repair. Now, what other work during the whole season up there did you do, if any, yourself and, of course, if it is necessary to state in your answer that you had somebody [304] with you assisting you, why do so—but I mean work that was looking towards prospecting that claim for mineral.

A. You mean how much time I put in or what the value of it was?

Q. I want to find out just what you did first, no matter whether you were alone or somebody with you. You stated now that you did some work on the dam to divert the water? A. Yes, sir.

Q. Now, any other work you did there on this one particular claim and what kind of work—I wish you

(Testimony of H. T. Tripp.)

would state to the Court whether you were alone or whether somebody was with you.

A. I have been up and down the canyon several times examining the formation, picking off pieces of rock and doing that class of work—that would naturally come in my line. The canyon crosses, or the Parish #2 claim crosses the creek and there is a lot of this country that is exposed, that is the Parish #2 claim, exposed in the creek. There is no brush there, it is a very handy place to get at. I did a lot of work up and down the creek myself, with my own hands and in the way of an examination, breaking rock off and doing testing work and digging into the bank with my pick.

Mr. SHACKLEFORD.—We move to strike that answer as immaterial to any of the issues in the case.

Motion denied. Defendant allowed an exception.

Q. What were you digging there for?

A. Looking for something in the shape of rock that would carry value.

Q. Now, did you have anyone else do any work there for the same purpose you have just indicated?

Same objection. Objection overruled and defendant allowed an exception. [305]

A. I had trails brushed out all through, all over that part of the claim on which—let us say it is located on the southerly side of the creek, the Parish #2, on the southerly side line,—I had trails brushed around through there, so I could get around myself or anybody else could get around, and I had the men instructed to look for ore either in place or in slide

(Testimony of H. T. Tripp.)

or anything that looked like ore.

Q. What purpose did you have that water used for, when you diverted it from the stream? I understood you let the water down from the dam to the Parish #2 lode claim? A. Yes, sir.

Q. And cleaned out that ditch for that purpose?

A. Yes, sir.

Q. When you got the water down there—I am asking you—

A. It was my intention to do some sluicing there on the lines Mr. Ebner testified to, and I was desirous of finding whether there was anything in the shape of pay in the surface dirt there. If I found any pay in the surface dirt it would indicate to me that there was something of value underneath or above at some place, and along that line, I had a little cut run and I had this man Dewey carry lumber down and build a sluice-box and shovel dirt in for a day or two days,—I have forgotten which,—to determine something about the value.

Q. Now, Mr. Tripp, I will ask you if the formation of this mining property, particularly this lode claim, is such that you, as a mining man, in sluicing off the earth from the top of what might be the vein or the ledge or lode, whichever it may be, would be of any assistance to you in determining the value of the lode or lead or whatever formation that is [306] up there?

Mr. SHACKLEFORD.—We object to that as misleading. Counsel is quoting the witness as having removed the dirt from the top of the formation and

(Testimony of H. T. Tripp.)

the witness has actually testified as to sluicing the dirt for the purpose of determining whether it had values in it and then subsequently looking for the ledge.

Objection overruled. Defendant allowed an exception.

A. O, don't know exactly what that question is.

Q. I will ask you if this kind of work you were doing there,—you say you were sluicing off to find values,—would be of any assistance to you in determining the value of that piece of property as a quartz mining claim or lode mining claim?

A. I think that any values found in the surface are an indication of values there, lead matter, in that particular section of the country. I would say that on the general line that through this section of country there are no regular gravel channels. All gold comes from leads or lead matter or lead formations, anything in the shape of placer ground found in this country comes, according to my belief, from the quartz leads.

Q. From the decomposition of the quartz lead?

A. Yes, sir, or the erosion. I think you will find that the same over on the Treadwell mine. I believe the Treadwell mine was discovered first by the dirt that was on the surface carrying gold—I know that is a fact in California along the mother lode. I don't believe there is a regular mine on the mother lode that the old prospectors did not discover by ground sluicing up to it.

Q. Now, I ask you if this sort of work would be of

(Testimony of H. T. Tripp.)

any assistance [307] to you in indicating as to where would be the best place to run a tunnel for the opening up, developing and mining of this property, of course, including the Parish #2 lode claim?

A. Well, it certainly would—

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

The WITNESS.—(Continuing.) I couldn't drive a tunnel very well through from any point below without driving a main working tunnel through the Parish ground.

Q. Parish Number 2?

A. Parish #2, yes, sir; and if I chose to run further to the north or to the south, I would be governed by the conditions that I found on the surface and which I thought would run underneath the most of the surface values.

Q. Now, besides the work that you did on the Parish #2, how many days' work altogether did you have done for the benefit of this claim and the Parish #1 which adjoins it?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial and no foundation laid for the question.

Q. I mean besides the work you did yourself, how many days' work upon these two claims did you have done as assessment work—as assessment work for the year 1909?

Mr. SHACKLEFORD.—We object as calling for

(Testimony of H. T. Tripp.)

a conclusion of the witness.

By the COURT.—He may answer but at the same time stating what the work was.

Defendant excepts. Exception allowed.

A. Well, I had fifty-one days' work done on those two claims and it consisted in digging roads and chopping trails and [308] the work that I carried out and instructed in the shape of giving Mr. Dewey the orders to pan for anything that he found in crossing and recrossing through the great thicket of brush that is up there on these claims, on the south side.

Q. Now, I will ask you, Mr. Tripp, does the brushing off, is it or is it not any aid or assistance in the other work that you were carrying on there, to find out about the formation and uncovering or removing the earth from the top of the ground—is the brushing of any assistance,—does that have to be done?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial.

By the COURT.—On that ground it is overruled, but it is leading.

Q. I will ask you what you brushed off on this trip?

A. A man couldn't go through there at all without brushing it off; the ground now looks like a broken down corn-field, and along in the summer time, it is almost impossible to go through that country. It is filled with devil clubs where the alders don't grow up, and they stand up about fifteen feet over your head, and to make any kind of a crossing in there you have to cut your way,—it is a regular jungle and thicket.

Q. I will ask you, Mr. Tripp, would that be any

(Testimony of H. T. Tripp.)

work that would precede the moving of the earth from the top of the ground, what you might consider the ground?

A. It would precede, it would precede anything.

Q. How much of this work, Mr. Tripp, approximately how many days of it was done on the Parish Lode #2?

A. Well, nearly all of it. I had a trail dug out or chopped [309] out so that it led up from the Jualpa flume on to that property across Snowslide Gulch and that part of it would have been on Number 1.

Q. Which one of those claims is the lower claim,—the Parish #2 or #1?

A. The Parish #2 is the northerly claim.

Q. Is that down the hill or up the hill from the Parish #1? A. It is lower, on lower ground.

Q. Parish Number 2 is? A. Yes, sir.

Q. If you have any other way to explain to the Court how this work would be beneficial to the lode claims in question, I wish you would state it.

Mr. SHACKLEFORD.—We object to the question—it calls for an argument.

By the COURT.—No, it calls for an opinion of the witness on a matter in which the witness is supposed to be an expert.

Objection overruled. Defendant allowed an exception.

A. You want me to state as to what I think would be assessment work on that property?

Q. Well, particularly the question was as to

(Testimony of H. T. Tripp.)

whether this work would be beneficial as assessment work, and I asked you to state to the Court why in your opinion it was beneficial for that purpose.

Same objection.

By the COURT.—As assessment work,—that is a matter of law. The question will be whether this work would be of benefit in developing and improving this particular claim.

Q. With the modification the Court has made to the question, I wish you would answer it. [310]

Same objection. Objection overruled. Defendant allowed an exception.

A. If I could find anything in this great big thicket of brush like an outcrop of ore that would be of value and cause me to change the direction of a tunnel so as to go directly under that ore or go in the neighborhood of it, it would certainly be of a great deal of value to that property. That is what I was hunting for. I was doing the same class of work on the patented mines above, on which the assessment work did not come into question at all.

Q. Now, I will ask you if this work on the two lode claims, the Parish #1 and 2, was directed towards the assessment work?

Mr. SHACKLEFORD.—We object to that question as calling for a conclusion of the witness and leading.

(By the COURT.)

Q. You had agreed to do this assessment work?

A. I understood it was my business.

Q. You didn't do any other work than you have

(Testimony of H. T. Tripp.)

described? A. Yes, I did.

Q. Tell what the work was.

A. Any work that I did on that ground after or that was done besides myself in the shape of digging roads or anything of that kind, I charged to assessment just in a general way, and I had a road dug from the main road down to the head of the stairway that leads to the compressor, which is on that ground—

Mr. SHACKLEFORD.—You mean the stairway is on the ground?

A. The stairway that is on that ground, or was on that ground or starts from that ground and leads down to the compressor. That road was practically obliterated, it was covered by a [311] slide, and I had that road completely cleaned out, so that it would go down; and I had a tram built and a deadman put in and a cable that was about three hundred feet long,—I think something in that neighborhood,—fastened to this deadman and run down and fastened to the rock next to the compressor. That was a part of the work that I did—cleaned out the road, put up the tram myself. I never charged my time up,—I charged my time up to managing expenses.

Q. You were the manager of all the work and directed the work up there? A. Yes, sir, I was.

Q. And those men that you put to work on the Parish claims, did you direct them what to do?

A. I certainly did.

Q. Now, this work of building a road down from the main road to the air-compressor—is any part of that road on the Parish #2? A. It is, yes.

(Testimony of H. T. Tripp.)

Q. On which side of the creek as you go up?

A. Well, it is on the northwesterly side.

Q. The left-hand side as you go up the creek?

A. The left-hand side as you go up the creek; yes, sir.

Q. Now, I will ask you if you did any work in putting that air-compressor in condition to use it?

A. I did; I had a new shaft put in that air-compressor, took the old one out. I had the water-wheel repaired and all lined up, and I spent in the neighborhood of two hundred dollars putting that air-compressor in shape.

Q. You have not counted this work on these fifty-one days that you say you have done? [312]

A. No, sir, that has nothing to do with it—that is charged to machinery account.

Q. I will ask you what was your purpose in putting that air-compressor in condition?

Objected to as calling for a conclusion of the witness. Objection overruled. Defendant allowed an exception.

A. I had decided on a line of tunnel way down on the Cape Horn that would have come under those claims.

Mr. SHACKLEFORD.—We object to any testimony with reference to the tunnel on the Cape Horn, because it appears from the admissions of counsel in the case and from the dismissal of the Cape Horn cause of action that the Cape Horn does not belong to this group of claims and that the tunnel mentioned in the witness' answer is not contiguous to it.

(Testimony of H. T. Tripp.)

Judge WINN.—We expect to follow that up with evidence of Mr. Ebner that he directed this.

Objection overruled. Defendant allowed an exception.

A. I had decided on the location of a tunnel that would crosscut that country and I had faced up and prepared for machine drills, and I had put that machinery in shape and I had also put the dam in shape and the flume in shape. I had rebuilt the dam,—the dam had been washed out and I spent over two hundred dollars in fixing that dam and preparing it to run the water down to run this compressor.

Q. On this map, Plaintiff's Exhibit "N" in this case, there is marked a tunnel, called the Ebner Mine tunnel—you know where they are running that tunnel now, do you not, on the ground,—that big tunnel Mackey is running? A. Yes, sir, I do.

Q. Now, I will ask you to state to the Court approximately where you had determined to locate this tunnel for which [313] you were putting this air-compressor in repair to run.

Mr. SHACKLEFORD.—We object to that. The location of a tunnel, either by survey or otherwise, is no part of the development work of the mine and further, as last stated, it is evident that the tunnel was started from noncontiguous property.

Objection overruled. Defendant allowed an exception.

A. I have not been right down to that ground since but I have been along the road. I was there the other day, and from the dump pile and from the face

(Testimony of H. T. Tripp.)

of their drift, I should judge it was very nearly the same place I ran my cut, but I have understood from parties that told me that they chose a new place, but I don't know.

Q. You know that the work they are doing up there on the tunnel is not very far from where you were?

A. I have been told that they started a little higher up than I did.

Q. I will ask you if you did any work on that tunnel? A. I did.

Mr. SHACKLEFORD.—Which tunnel?

Judge WINN.—The one he located.

Mr. SHACKLEFORD.—We object to that for the reason that the evidence shows that that work has been abandoned, as I understand it.

Objection overruled. Defendant allowed an exception.

Q. I asked you if you did any work looking toward running that tunnel—you did work on the tunnel?

A. Yes, sir.

Q. What did you do?

A. We blasted a cut in there about twenty to thirty feet, I should think. [314]

Q. Do you know how much work you put in on that? A. Yes, sir.

Q. How many days and what was the value, what you paid for it?

Same objection. Objection overruled; defendant allowed an exception.

A. I can't give that in detail now. I could find out, I guess.

(Testimony of H. T. Tripp.)

Q. Give it approximately.

A. I did about three hundred dollars' worth of work down there altogether in connection with that—cleaning out a road running up to that tunnel and cleaning the brush off and doing all the work in connection with preparing that place for a tunnel, to be started.

Q. Now, in 1909, I believe, you said it was that you put this air-compressor in condition for the purpose indicated in your testimony. I will ask you whether or not you know that Mackey, who succeeded you, in doing this work there, who is engaged in running this Ebner tunnel, is using that same air-compressor that you put in repair for running that tunnel?

Mr. SHACKLEFORD.—That is the air-compressor on the patented ground?

Judge WINN.—Yes, sir.

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial. It is a part of an already established mining plant, that is supposed to be alive, supposed to be kept in condition, irrespective of the development of any contiguous nonpatented claim.

Objection overruled. Defendant allowed an exception.

A. That is the same compressor and they are using it now to drive that tunnel.

Q. Now, I will ask you if, in following out this plan or scheme [315] of yours for the opening up of this claim and running this tunnel, if this tunnel you had started had been continued, whether or not

(Testimony of H. T. Tripp.)

it would have run through the Parish lode #2?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. A tunnel could not be driven to reach the Ebner mine in any practical way without going under the Parish #2 at some point, from that point I selected, in some position.

Q. I will ask you if such a tunnel driven there would develop the Parish lode claim #2?

Same objection. Objection overruled. Defendant allowed an exception.

A. It would be driven through it, and anything of a mineral nature in there would be discovered and put in shape so it could be sampled or mined and milled, if there was anything worth being mined and milled.

Q. I wish you would step down to this map, Plaintiff's Exhibit "N," and see if you can indicate relatively where you commenced this work with respect to this tunnel, this Ebner tunnel?

A. I don't know just exactly where that is, whether it is right above mine or whether it is on the side. You can't tell from that map.

Q. From the direction,—if this is the proper direction that this present tunnel is being driven, how would the tunnel you commenced and drove be driven with respect to it?

Same objection. Objection overruled. Defendant allowed an exception. [316]

(Testimony of H. T. Tripp.)

A. It would run along on the same general line. I might have chosen a place further down on the line to run to because of my knowledge that the ore bodies in that mine, while they dip to the northerly, I think they have a tendency to work towards the south and I would like to have tapped that. That was a notion I had in my head and the general opinion I had, that that mine should be opened by the tunnel being driven so that it would finally wind up there or intersect the lead further to the south than in the neighborhood of the old Ebner mill, and in that way the work that I was doing in this part of the country—

Q. That is up—

A. Up on the Taku and Parish and the Lotta, all of that sampling work I was doing, I would have liked to have the tunnel taken a direction to come as near that ground in here (indicating), that I considered the most worthy of being opened.

Q. That is along about the centre of the claim?

A. Yes, sir, and have it strike within the limits of the claim on the southerly lode line of the Ebner mine—I think that would be the southerly lode line—no, it would be easterly not southerly.

Q. Did you do anything with the water of Gold Creek in the way of applying it or getting it ready to apply, for the purpose of generating power at the air-compressor?

Same objection. Objection overruled. Defendant allowed an exception.

A. Yes, I did. I got the compressor ready to run and got the air pressure up and I also run a

(Testimony of H. T. Tripp.)

dynamo and furnished lights for the camp. We had lights in our boarding-house and [317] lights in the office and all over the place, that is, where lights were needed.

Q. Did you get through with telling what you did looking towards bringing the water down to the air-compressor? A. Yes, sir, I did.

Q. This work that you have just been describing about bringing the water down and this work that was done on the tunnel, etc., and all the other work you have described except that matter you referred to a while ago as work done on the Parish #1 and 2, was that work exclusive of the fifty-one days you have given and applied to the Parish, or did it include those fifty-one days?

A. No; that had nothing to do with the Parish claim,—I wasn't fixing up for a lawsuit,—I put the work directly down as it was, as the men did it. I had a little chart or paper that I kept the assessment work on lying on the table and there was a draughting board over it, and I used to go in there at night, when I made up my time, and I put down on the time-book the time the men worked and then I marked down where they worked on that sheet of paper,—I had two of them, one for that purpose and one for another purpose. I am sorry that I haven't that paper now. It was carelessness in me that I lost that paper.

Q. I will ask you if any other work was done in the way of building roads or trails down at this lower end of this Ebner property?

(Testimony of H. T. Tripp.)

A. I also said I dug a trail and cleaned out a trail that ran around to the Jualpa claim,—had it brushed out; it was no great amount of work.

Q. That is up there around Cape Horn? [318]

A. On the other side of the creek from Cape Horn, on the southerly side.

Q. Did you do anything in building any road off from the main road that goes up the Basin to where you had commenced your tunnel?

A. Yes, sir, I did.

Q. What did you do there?

Same objection. Objection overruled. Defendant allowed an exception.

A. Why, I had an old road cleaned out. There was a big slide that came down there and covered that road up for a great distance, and then I had to clear it and make way for a road to get around to the place that I intended to start this tunnel, where I did start this tunnel—where I started the cut, I didn't get underground with it.

Q. Do you know approximately the money you spent in that?

Same objection. Objection overruled. Defendant allowed an exception.

A. I can't tell you exactly what it was.

Q. Within fifty or twenty-five dollars?

A. I don't know. I suppose I put in—probably there was eight or ten days put in there maybe,—perhaps more; I don't know.

Q. You heard this young man Oscar Harri testify—were you in the courtroom yesterday when he

(Testimony of H. T. Tripp.)

testified? A. Yes, sir.

Q. When you went up to the property there, some time in August, who, if anyone, did you find up there on the property? A. Oscar Harri.

Q. Now, then, the work that he testified concerning yesterday that he had done before you came up there, have you included that in your estimate? [319]

A. No, sir, I have not.

Q. Now, how long about, altogether, were you up there on that propetry in 1909?

A. I was there all the time, from the 18th day of August during the balance of that year, until the third day of August, 1910.

Q. Now, during this year of 1909, in referring to the work that was done on the two Parish claims, you have not counted any of the work you did on those claims? A. No, sir, I have not.

Q. On those fifty-one days? A. No, sir.

Q. That was in 1910 that you made a water location up there, was it not? A. Yes, sir.

Q. Now, I will ask you, Mr. Tripp, as long as you kept at work there up to 1911, if the work you carried on was all looking towards this general plan or scheme of opening up this property in the manner you have described to the Court?

Objected to as leading. Objection sustained.

Q. What was your work all the time you were on there in charge of the property and had any men working for you—what did your work consist of?

A. My work consisted in laying out and planning a line of work for the Ebner mine.

(Testimony of H. T. Tripp.)

Q. Did you take up any millsites?

A. I did; yes, sir.

Q. Did you, after having Mr. Wallenberg with you making these surveys, etc., and carrying on this work, had you also concluded as to where the most accessible place of building a mill for the purpose of opening up this property and mining its ores would be?
[320]

Same objection. Objection overruled. Defendant allowed an exception.

A. I had chosen the place.

Q. Where was that point with reference to the foundation that has since been cleared off for the building of a mill?

Same objection. Objection overruled. Defendant allowed an exception.

A. It would not have been exactly in the same place,—it would have been in the neighborhood of the same place; it would have been further up the creek and along the line under Cape Horn, where it would have been more protected than the place that was chosen, according to my notion.

Judge WINN.—That is all at this time.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. You were sent out from New York by people who before had been strangers to this property?

A. Yes, sir.

Q. I understood that is the California & Nevada Copper Company.

A. That is who I understand it to be; yes, sir.

(Testimony of H. T. Tripp.)

Q. They had an option on the stock of the larger stockholders of the Ebner Gold Mining Co.?

A. I can't tell about that. I never have seen an option. I was not consulted on that score.

Q. The property was not turned over by deed?

A. I couldn't tell that.

Q. You don't know anything about that?

A. No, sir.

Q. Have you ever heard Mr. Ebner say?

A. Well, I heard him on the witness-stand; that is all. [321]

Q. Not any other way? A. No, sir.

Q. Anyway, you were sent out here and with Mr. Ebner's permission you took charge of that property? A. Yes, sir.

Q. And your first idea was to organize a plan of campaign, after making a general investigation of the property, as to how to get the ores out of that ore body economically.

A. Yes; I think that certainly is along the line I was working all the time I was there.

Q. And in doing that you started out first and made a reconnaissance of these various claims known as the Ebner property to ascertain the location of the surface values of the claims?

A. I did practically no work along the line that is known as the Ebner lead. I let that alone—I knew enough before that, or at least I thought I did.

Q. That is, that had been developed underground in such a way that surface work could not do any good? A. Yes, sir.

(Testimony of H. T. Tripp.)

Q. But down here on the Taku lode, you did most of the reconnaissance work?

A. I did a lot of work there.

Q. And on the Lotta?

A. I am not so sure about that line, where I did most of the work. I had a map. My maps were turned over to the California & Nevada Copper Company and it has gone out of my head a little as to the lines dividing those claims.

Q. It is somewhere under the Taku and Lotta?

A. Yes, sir.

Q. Between the Keystone and Lotta? [322]

A. Yes; it was on the slope where the watershed would go to Gold Creek, below the present old mill or compressor—new mill, I mean, or compressor-house.

Q. Do you know where Miller's Gulch is?

A. Yes, sir.

Q. It was on the other side of Miller's Gulch, up the creek from Miller's Gulch?

A. It wasn't far from the line that separates those claims, from the Apex, Royal and Enterprise lodes.

Q. Upon that hillside? A. Yes, sir.

Q. Now, that work consisted in looking for crop-pings and taking samples?

A. Anything in the shape of value; yes, sir.

Q. I understand you to say that you did not get after anything that you did not see some indication on the surface?

A. That is what I was looking for; in my judgment, wherever I got evidences of values there, I had picking done.

(Testimony of H. T. Tripp.)

Q. So as to get a fair sample?

A. That is the idea.

Q. I understand that late in the year you went up there with Harri and went to Snowslide Gulch,—with Oscar Harri, was it? A. Late in the year?

Q. Yes—the time he testified about?

A. Yes, sir.

Q. Some time along after the middle of August?

A. Yes, sir.

Q. And repaired a dam?

A. I said I sent Oscar Harri with another man to show him. I went afterwards—I didn't go at that time. I remember sending— [323] I wouldn't be so positive that it was Oscar Harri—John Soini that I sent down with this man to show him where the dam was—he got lost in the brush somewhere and didn't find the dam, which is not strange at all, because that place is very much covered over, hard to get through.

Q. If a system of assessment work were kept up on that property for ten years, consisting of clearing the surface, you wouldn't be any further along at the end of ten years than when you started hardly, that is, removing vegetation?

A. No, it would grow up every year.

Q. That sort of assessment work for a series of years wouldn't give you any headway in the development work?

A. Not a great deal. It wouldn't give any really because it would grow up.

Q. And this work of ground-sluicing is imported only at the early stages of location for the purpose

(Testimony of H. T. Tripp.)

of locating the ore body in such a way as to attack it underground?

A. That would be the intention—that would be what I would sluice for, and that is the only purpose I would sluice for in that country.

Q. What did you find on the parish #2 lode when you went on there to indicate assessment?

A. I saw where there was a lot of sluicing that had been done. I saw an open cut that had been run.

Q. That is up where it is marked Borean diggings?

A. There is a pit runs through there but how much was done by Borean I have no knowledge whatever—I don't know—but I did see some sluicing that had been done down there on the Parish ground.

Q. The Borean diggings is very nearly the boundary of the Parish [324] Number 1 and 2?

A. Yes, sir.

Q. And any dirt work in that open cut near that boundary would really tend to develop the Parish #1 instead of the Parish #2, wouldn't it?

A. No, I don't think so.

Q. If there is dirt there with value in it it has probably come down the hill?

A. Yes; but it wouldn't come down the hill that way, from that side of the gulch.

Q. From that side of the gulch?

A. From that side of the gulch.

Q. The upper end of the Parish lode claim #2 and the cut that is in the ground there now is pointed toward that end line of the Parish #1, isn't it?

A. The end line, the dividing line between the

(Testimony of H. T. Tripp.)

Parish #1, and 2, cuts across the head of the Borean cut some place. I don't know exactly where that line is, although I helped to brush it out. I know pretty nearly.

Q. Have you been on the claim recently at that point? A. No, sir, I have not.

Q. Do you remember a cut, a recent cut, apparently a recent cut, in the gravel there, pointing up toward the Parish #1 line? A. Yes, I do.

Q. Now, the continuation of that cut, within a few feet, would be across that line, wouldn't it?

A. Well, I couldn't say as to that. I don't know whether that is on Number 1 or Number 2. I don't know; that is getting down pretty fine. [325]

Q. The thing that I was trying to get at was that, comparatively speaking, any work near that end line there would tend more to develop the property up the hill from it than the Parish #2?

A. I don't think that, because I think the water would run down off the hill or any cave or slide would come down off the Royal lode,—it would slide down that way, from the Royal.

Q. Then, whether it came from the Parish #1 or the Royal it would be more apt to give you an idea of the values in those claims than it would in the Number 2 Parish?

A. But if I find the value in the Royal, I could look for it in the continuation, in the Parish #2.

Q. But the dirt would indicate that it came from there? A. Yes, sir.

Q. And the question where the ledges came from

(Testimony of H. T. Tripp.)

is a question of geology that you couldn't settle from your surface work anyway?

A. Not without work; no.

Q. Now, this road here that you testified to is connected with a stairway that leads to the compressor?

A. It runs down to the stairway or where the stairway was.

Q. And the stairway goes down across to the compressor?

A. Yes; we practically did away with the stairway,—it wasn't safe. We put in a wire rope way to take the place of the stairway that was in there.

Q. That compressor has been there for some years?

A. Yes, sir.

Q. It is part of an established plant and is situated on the patented Lotta claim? [326]

A. Yes, sir, I suppose it is on the Lotta.

Q. We will assume that for the purposes of this question? A. Yes, sir.

Q. And that road and that tramway was built for the purpose of repairing the compressor and having easy access to the compressor?

A. It certainly was; yes, sir.

Q. And it wasn't connected with any tunnel, open cut or other development work that had been going on or was going on on the Parish #2 lode, was it?

A. No; it was not for the sake of getting to a place where we were cutting some trails or doing any of that work.

Q. It wasn't for the purpose of reaching any point on the Parish #2 ground?

(Testimony of H. T. Tripp.)

A. Only to get down on that ground—there is a great big flat there; there is quite a flat there; there are two or three acres of ground, and I had that particular ground surveyed out, in a prospective way, as to whether it would be a millsite or not, and that was going down on that ground for a general line or purpose.

Q. That is before you determined the place for the mill?

A. I didn't determine the place for the mill at all until I got through figuring and had everything lined out and all plans considered.

Q. Whatever intention you had of using that road as an access to a proposed millsite on that plat has since been abandoned?

A. Yes, sir, it has—by me it was.

Q. As far as indications are concerned, it is still abandoned? A. Yes, sir. [327]

Q. Now, I want you to tell the Court how many other unpatented mining claims you were trying to protect that year, 1909.

A. I think I had eleven claims up on Mount Juneau that I had some finishing work to do on in the shape of—

Q. I didn't mean yourself. I mean protect as a part of the Ebner property?

A. As a part of the Ebner property under my control?

Q. Yes.

A. I had the Cape Horn and a claim called the Cape Horn #2, and the Eureka and a fractional placer

(Testimony of H. T. Tripp.)

claim that was located up by the Ebner dam.

Q. And what about the Auk Chief and the Taku Queen—they were held in some way or other for that purpose?

A. Yes; but I bought those with the understanding that the assessment work had been done.

Q. There was no attempt to do any work on those that year? A. I didn't do any; no, sir.

Q. Where is the Cape Horn #2—it covers the proposed stamp mill and the entrance to this Ebner mine tunnel indicated on Plaintiff's Exhibit "N," doesn't it? A. Yes, sir.

Q. It is a lode claim?

I. I don't know what it is; it was a millsite at one time. I understood it was a millsite when Mr. Wettrick and Mr. Hill surveyed it.

Q. And what do you understand it to be now?

A. It was located by Mr. Ebner—I think it was. It was located as a lode claim.

Q. Now, at that time you also understood that the Cape Horn lode was part of the Ebner property? [328]

A. I did. I was so instructed.

Q. Now, Mr. Tripp, what is the value belt through the Ebner property, the main value belt as developed at the present time—where does it run through those claims?

A. It runs across the location of—it runs along the northerly end clear across all of those locations. No, it does not, either—I take that back. It runs almost diagonally across them.

(Testimony of H. T. Tripp.)

Q. Across the patented locations?

A. Across the patented locations; yes, sir. It would naturally come out there and it would apex about in here some place,—about the center, somewhere along in here (indicating). I can't locate it exactly, but that is about the general direction.

Q. About from corner #2 of the Lotta lode to the Golden Fleece in the easterly corner of the Golden Fleece?

A. About three or four hundred feet down on the Crown Point from the southerly corner.

Q. What is the formation there, to the southerly main value belt there?

A. It is a broken up formation—different kinds of formation and altered rock.

Q. Is there a foot to that belt?

A. I don't know whether there is or not. I haven't been able to determine.

Q. You spoke in your direct examination of the inclination of the footwall?

A. I spoke then of the footwall of the Ebner lead, which is a slatey formation generally for a few feet, but changes into a diurite. I don't know what other geological changes do take place there; there are so many of them that I [329] wouldn't care to try to state.

Q. Have you the result of your investigations with reference to this work on the Parish lode, showing the points at which you took your assays?

A. No, sir.

Q. Where are they? A. I haven't any.

(Testimony of H. T. Tripp.)

Q. Did you make a map and point out the places where the different samples are taken from?

A. I never got that far on that claim.

Q. Did you take any assays of the rock that you looked for on the claim—did you take any assays of the rock on the Parish #2?

A. I took some assays at one time from the Canyon, but I never took any from over the country. None of my investigations found the outcrop of any rock, ore body, that I felt like digging on.

Q. What about the creek? There was an old tunnel there in the creek—did you take anything off that stringer? A. I did not.

Q. Now, as a matter of fact, from the appearance, the position of those claims with reference to the other lodes, the patented lode claims, it would appear that they are held simply as quartz claims for surface purposes, would it not?

Judge WINN.—We object to that. Objection sustained.

Q. Well, your idea that fall was that you had to protect the Cape Horn #2, the Cape Horn lode, the Parish #2 lode and the Parish #1?

A. Yes, sir, and the Eureka.

Q. You knew at that time and the Auk Chief and the Taku Queen intervened between the Cape Horn and the Parish? [330]

A. I knew that there was some claims in there, but I didn't know just how they laid, and I bought them so as to stop any possibility of a conflict, to make any trouble about running a tunnel through there.

(Testimony of H. T. Tripp.)

Q. As a matter of fact, there is a space between those corners, is there not?

Judge WINN.—Between what corners?

Mr. SHACKLEFORD.—Between the Cape Horn corner and the Parish.

A. I think there is, yes, sir. I don't think they join there.

Q. The Eureka was another claim you had to protect?

A. The Eureka was a claim way up on the side hill some place.

Q. Was that an Ebner claim or purchase?

A. I don't know—I didn't purchase it.

Q. It was simply turned in? A. Yes, sir.

Q. And shown to you as part of the Ebner property?

A. I don't know whether that does or not—I don't think it does. I think that belongs more as an outlet to the Dora group in case all other outlet is blocked off—that is the idea I had.

Q. You considered it as part of the property under your control, didn't you?

A. Mr. Ebner spoke to me about doing the assessment work.

Q. Did you do any separate work on that claim?

A. No, sir, I did not.

Q. So, outside of the work already described and the reconnaissance work already referred to by you, if that is applicable, the other work that is mentioned here toward the development of all those claims was the driving of about \$300 worth of a tunnel on the

(Testimony of H. T. Tripp.)

Cape Horn lode, the Cape Horn #1 [331] and the Cape Horn lode?

A. If you want to get at the matter of expense, I could have segregated the cost expense and the teaming expense and the amount I put on the road between here and Juneau—I put nearly \$200 worth of work. I paid Mitchell \$61 for the half of the building of a bridge and repairing the road out here—there was a landslide—and a lot of other work that all went in for the common benefit of the mines I expected to open and *usage*, for the purpose of opening.

Q. Not only for the protection of the unpatented lode claims, but for the protection of a mine in which a considerable amount of money had been invested?

A. Yes.

Q. And upon which a large amount of machinery had been placed and which contained these patented claims?

A. On which a lot of machinery was expected to be placed.

Q. The road you are now talking about is the old Basin road that has been maintained there as a highway for all the mines there for a great many years past? A. Yes, sir.

Q. Now, I am not talking about that—your claim is that you expected by the use of the tunnel upon which you—I understood you to say you expended \$300, together with the other work you described in your testimony, to protect the Parish #1, the Parish #2, the Cape Horn and the Cape Horn #2

(Testimony of H. T. Tripp.)

and the Eureka lode?

A. No, sir; I never said anything of that sort.

Q. I want to understand how it is.

A. I did the work on the Parish #1, what little I did on [332] the Parish #1, and I did most of the work on the Parish #2, which I considered conscientiously was necessary assessment work to have been done on that claim that year and which I considered was done—I didn't propose to throw away any of the company money digging around in a way that would not be eventually for the benefit of the property—I wasn't there to waste money.

Q. I am speaking, though, outside of that testimony, under your claim about the matter there was three hundred dollars' worth of work spent on this?

A. Yes, sir.

Q. That is what you claim to be the work done, \$300 worth of work in addition to the other work you have described?

A. Yes, sir, in addition to anything else I have been questioned about.

Q. Where did you take that water out of Snowslide Gulch—can you point out on the map approximately? A. No, I cannot.

Q. You described a trail which you started down here somewhere about the Jualpa dam?

A. No, sir, from the end of the Jualpa flume.

Q. The big flume?

A. The big flume, yes, sir—so a man could come up the big flume.

Q. It run across the Colorado? A. Yes, sir.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN FIVE VOLUMES)

EBNER GOLD MINING COMPANY (a Corporation),
Plaintiff in Error,
vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant in Error.

VOLUME II.
(Pages 369 to 736, Inclusive.)

Upon Writ of Error to the United States District Court of
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FILED

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(Testimony of H. T. Tripp.)

Q. It ran across the Idaho?

A. I suppose it ran across there. It ran over an old trail and down into the creek and up on the other side and on to the Parish,—I think it went on to the Parish #1. I am sure it [333] did. I think it goes across the corner,—I wouldn't be sure about that.

Q. You mean leading up the mountain?

A. No; I mean going over on to the Parish #2.

Q. How high up Snowslide Gulch does that trail cross?

A. If you know where there is an old tramway terminal—that went past that tram terminal.

Q. You mean the big tower?

A. An old tower that was built by the Nowells, I think. We went into the creek slantingly around on the side of the creek, so as to get out there and come up on the other side of the creek.

Q. And that was to give you access?

A. No, it was so I could go and come this way from Juneau up on to these claims, without going way up around and coming down the other way.

Q. I didn't finish the question. That was to give you access to the upper ridges of this property where you were engaged in this investigation?

A. Yes, sir.

Q. And the road was not built to lead to any particular point where you had determined to do any such development work either on the Parish #1 or the Parish #2? A. No, sir, it was not.

Q. Mr. Tripp, what work did you do on the Cape

(Testimony of H. T. Tripp.)

Horn Number 1 and the Cape Horn #2, and the Eureka, except the driving of a tunnel?

A. I cut the brush and I cut the underwood from the main wagon road off down to the place where I expected to start this tunnel up toward the point in the road called Shady Bend. [334]

Q. So as to get a connection with the main road?

A. Yes, sir. I had a lot of wood cut there and piled up, rather than waste it, that I got from that place and had it hauled down to Widow McLaughlin.

Q. There was no other work done as assessment work on the Eureka and Cape Horn and the Cape Horn #2 except that work you have described?

A. No, sir, there was not.

Q. And that was intended as work on these claims?

A. Yes, sir.

Q. Now, about the Borean pit. You had a sluice-box with riffles put in there? A. Yes, sir.

Q. And there was a rocker there, too?

A. No, sir, a man had a pan—no rocker.

Q. Did you get any values out of that ground?

A. Nothing worth talking about.

Q. You can't locate on this plat, can you, exactly where the tunnel you started is, with reference to the present tunnel?

A. No, I couldn't tell by looking at that map. It would require a survey to tell that but it is practically in the same place, I should think.

Q. You know it is not exactly in the same place?

A. From what I am told, they say it is not—I don't know. I understood they chose a place a few

(Testimony of H. T. Tripp.)

feet higher up than I did.

Q. This air-compressor and mill and the water right which you repaired have been part of the main works of the Ebner mine ever since it has been a going concern?

A. Yes, ever since I have known it. [335]

Q. And it was simply repair on equipment installed? A. Yes, sir.

Q. And the tramway which you spoke of as coming from this branch road near the place marked "chute" over to the compressor was for the purpose of carrying stuff to the compressor while you were repairing; is that right? A. That is right.

Q. But it was not connected with any scheme of development work on the Parish #2?

A. No, excepting for the general benefit of everything, all concerned.

Q. I mean which would connect with any particular spot which you intended to develop on the Parish #2 or any spot that had theretofore been developed? A. No, sir.

Q. It was not made for the furtherance of any particular scheme of development of the Parish #2, was it?

A. It was not for a scheme of doing assessment work, but it was for the purpose of—

Q. Aiding the whole property?

A. Aiding and opening and developing the whole proposition—the whole property; yes, sir.

Q. But its need became apparent when you started to repair the compressor plant on the Lotta?

(Testimony of H. T. Tripp.)

A. Yes, sir, it did.

Q. And that is what it was put in there for, temporarily?

A. That is what it was put in there for—to change some machinery and put other machinery in place of the machinery that was there.

Mr. SHACKLEFORD.—That is all at this time. I may ask leave to recall the witness after reading his testimony. [336]

Redirect Examination.

(By Mr. WINN.)

Q. In putting in this air-compressor and making these provisions, etc., for your work—if your work had been continued on, you would have had to use the air-compressor in driving through the Parish lode #2 the same as driving through any of the rest of them?

A. I would have used them in starting the work with, yes, sir.

Q. If your tunnel had been continued on through, you would have used it for the general purpose of driving the whole tunnel?

Objected to as cross-examination. Objection sustained.

Q. What would you use it for?

Same objection. Objection overruled. Defendant allowed an exception.

A. I would have used that until I could put other machinery in place. I had a ten-drill compressor stored on the wharf down here in Juneau to have put in place for that purpose, as soon as I determined

(Testimony of H. T. Tripp.)

where I would put it. I had ten drills also to go with the compressor and they are now here in Juneau.

Q. That machinery was intended for the enlargement of the plant that you have been testifying was to be built down somewhere on the flats?

A. Yes, sir.

Q. Now, then, did you or did you not intend to go ahead and use this air-compressor for the mining of the property as the Ebner Mining Company had been mining it or did you put it in shape for some other plant?

A. I had no intention of mining the Ebner mine as it had been mined.

Q. Now, you said something about having purchased the Auk Chief lode—for whom did you make that purchase? [337]

A. I bought that from one Tom McCullough and a man named B. M. Behrends, I think it was.

Q. Did you buy it for your individual self or for whom did you purchase it?

Objected to as not the best evidence. Objection overruled and defendant allowed an exception.

Q. From whom did you buy it?

A. From McCullough and Behrends.

Q. And for whom?

A. I was working for the California & Nevada Copper Company and I bought them for their interest—took it in my name and paid for it with their money.

Q. Was it intended to be a part and parcel of this

(Testimony of H. T. Tripp.)

whole Ebner property when you purchased it?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness, and it don't make any difference whether it was intended to be or not,—it is not a contiguous claim.

Objection sustained. Plaintiff allowed an exception.

Q. Was that bought by you to be a separate and distinct piece of property or was it bought by you for the purpose of protecting the entire group of claims up there in opening up and developing that as a property?

Same objection.

By the COURT.—He has already explained why he bought it on direct examination, to get out of some conflict as I recall it, so he would not have any lawsuits over the other property.

Q. Would that Auk Chief have been of any value to you or the people whom you represented, taking it apart from all the rest of the Ebner property?
[338]

Mr. SHACKLEFORD.—We object as calling for a conclusion of the witness and irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. If I was prospecting and looking for a location I wouldn't go and put a notice on it, locating it for the mineral values that are in it, as far as that is concerned. I don't know how to answer your ques-

(Testimony of H. T. Tripp.)

tion. I got it for the benefit of the position that it held, that is all, and possible conflict and being convinced that there was a piece of open ground there through which we might wish to drive a tunnel or pass over or something of that sort,—anything that might come up, wherever it would be of benefit to the property.

Q. To drive a tunnel for what purpose?

A. Opening the mine.

Q. That is opening all this property you have been testifying about?

Objected to. Sustained.

Q. Mr. Shackleford went into an examination quite extensively about the ore bodies, formation, etc., as developed on this property. I will ask you if you intended to answer that question of Mr. Shackleford to be a positive one as to the condition of the ore bodies there or has there been sufficient development work carried on there to satisfy you as to the particular ore bodies there that you wanted to mine?

A. I don't know what other development work might discover—I couldn't tell that. I wouldn't lay down any rule or make any statement as to what might be found underground.

Q. The fact is, that is what you were hunting for, what was underground? [339]

A. That is what I wanted to find. I wanted to find some place to find something underground.

Q. Now, I believe you stated that you remained on that property and had something to do with it up

(Testimony of H. T. Tripp.)

to some time in 1910 or 1911? A. Yes, sir, I did.

Q. Now, Mr. Tripp, I will ask you if you made any additional water locations upon this creek during any one of these years? A. I did.

Q. I will hand you a paper, which is marked "Location of Water," and ask you if you know anything about that paper writing.

Mr. SHACKLEFORD.—We object to that as not part of the plaintiff's case in chief.

By the COURT.—How does it become material in this ejectment case?

Judge WINN.—The only way that I see that any of this evidence along this particular line is admissible is that I offer to follow it up and show the kind of possession that the plaintiff company had of this land * * * they allege we never had any possession or were never on their claims—I think it is part of the scheme to carry out the development work as testified to, by the location of more water and will possibly have more strength in showing the development work, etc.

By the COURT.—If it is some act of assertion of possession in connection with development, prior to what you claim constitutes their ouster, you may show it for that purpose, if that is the only purpose.
[340]

Judge WINN.—I think that is the only purpose I see at the present time for which it is material.

A. You asked me if I had anything to do with the location of a water right and I told you I had in 1910.

Q. And I hand you this paper and ask you if you

(Testimony of H. T. Tripp.)

know anything about that paper writing—can you identify it? A. Yes, sir. I wrote that paper.

Q. Now, I will ask you if you ever did anything else with that paper or a copy of it?

A. Yes, sir, I posted that notice or a copy of that notice. I took a piece of carbon and laid it down on the table or a board—a table—at the Ebner mine boarding-house, and laid this paper on top of it and wrote the notice. John Soini was waiting for me and we walked up and put it down. John Soini nailed it on a post of the dam on the morning of the 20th day of June, 1910.

Q. What dam is that?

A. That is the Ebner dam—at the old Ebner dam where the water comes out now,—that runs to the compressor and is now running the compressor.

Q. Then, you posted it about the intake of the Ebner flume, that he has been using water out of to run his old mill, near there?

A. There was a post up there that had been used for some purpose in connection with the head works of the intake and it was nailed to that post.

Q. Now, Mr. Tripp, that notice you have in your hand—did you have it recorded or did you turn it over to us to record? I have forgotten.

A. I turned it over to you to record. [341]

Judge WINN.—We would like to offer this in evidence and then read it into the record. This paper may be a very material paper in some other litigation.

Mr. HELLENTHAL.—We object to it unless it

(Testimony of H. T. Tripp.)

is connected with the Ebner company in the first place and it is shown it was recorded, and we object further that up to this time there has been no evidence offered or received relative to the rights acquired under the water notice,—what water it covered. This notice does not sufficiently comply with the customs of miners in this district, and it was not recorded until October 25, 1910, long after the rights of these parties had been initiated and large sums of money had been expended.

By the COURT.—We are not going into the equities between these parties on the claim for this water on this water notice or any question of estoppel in the appropriation of this water. It is simply allowed as affecting the title and possession of the plaintiff to the Parish #2, their claim of possession. I take it this is to be followed up—this was an assertion of the use of the water in the development of the entire property, including the Parish. It will be admitted, to be used in the final argument.

Judge WINN.—It is headed, “Location of Water. Notice is hereby given to all whom it may concern, that I, the undersigned, claim Ten thousand miners inches of water flowing in this creek, or any part of Ten thousand miners inches, that may be flowing at any season of the year—to be conveyed by ditch, flume or pipe along the bank of Gold Creek, on the southerly side, or to cross the creek with pipe or flume, or both, to any place on the property known [342] as the Ebner mine, or to carry across or further than the limits of the said mine property.

(Testimony of H. T. Tripp.)

This location is made on the ground this day and date and is posted at the place known as the Ebner dam, about $11\frac{1}{4}$ miles up from Juneau on Gold Creek. Dated this 20th day of June, 1910. Time 7:30 A. M. Locator. H. T. Tripp. Witness John Soini."

On the back it is endorsed, "District of Alaska—Juneau—SS. The within instrument was filed for record at 10 A. M. o'clock on October 25, 1910, and duly recorded in Book 10 of Placers on page 186 of the Records of said district. C. C. Winn, Recorder."

Q. What was that water located for—for what purpose?

Mr. HELLENTHAL.—We object. The only way to make a water notice effective is to state the purpose of the water in the location itself—not being stated in the location, it cannot be supplied at this time.

Objection overruled. Defendant allowed an exception.

A. For the intended purpose of enlarging on the work and opening up and developing that mine and preserve the right for any additional amount required over and above the amount that had been used and acquired by the old Ebner mine.

Q. Mr. Tripp, Mr. Shackelford asked you if you were sent here by a stranger to this property to work on it. I will ask you who was the individual that you dealt with in making your arrangements to come here to work on this property.

A. F. L. Underwood, who was the president of the California & Nevada Copper Company, as I

(Testimony of H. T. Tripp.)

always supposed, and do yet and know, as well as I could know, that he was the president of that company.

Q. You heard Mr. Ebner's testimony, didn't you?
[343] A. I did.

Q. That is the same F. L. Underwood that he referred to in his testimony in the case?

A. I don't see how it could be any other.

Q. That is a man that lives in New York?

A. Yes, sir.

Judge WINN.—That is all.

Mr. SHACKLEFORD.—Have you that letter you were going to produce at the time Mr. Tripp was examined?

Judge WINN.—No, I haven't any letter to that effect, nor Mr. Tripp has not. I got the agreement he had with Mr. Underwood mixed up with the letter—I didn't know at that time whether Mr. Tripp was working altogether under Mr. Underwood or Mr. Ebner.

(By Mr. SHACKLEFORD.)

Q. Whom was this water location made for?

A. Made for the people I was working for.

Q. Whom were you working for?

A. The California & Nevada Copper Company.

Q. You were not working for Mr. Ebner?

A. No, sir.

Q. You were not working for the Ebner Company?

A. No; that is, not with any intention on my part I was not.

(Testimony of H. T. Tripp.)

Q. Is there any account in the books of the California & Nevada Copper Company of the men employed on these 51 days' work you have mentioned?

A. No, the account shows how much money was expended and for what purpose, but it doesn't show the individuals.

Q. Does it show it was for the two lode claims?

A. Yes, sir. [344]

Q. And it don't segregate the amount for each one? A. No, it does not.

Q. Have you ever made any segregation of the amount done on each claim?

A. I had a segregation made, but I haven't it now.

Q. The fifty-one days you speak of, as I understand it, consisted of work done on this side hill, in dirt work? A. No, sir.

Q. Did you add to that the work that was done on this road over here?

A. All the work I did on those claims.

Q. And it included the building of a tram?

A. No, it didn't include the tram—I bought that wire, that is charged on that book, but I didn't count that in the sixty-one days.

Q. It included the work done on the road?

A. Yes, sir.

Q. How much work was done on the road?

A. I couldn't tell you just exactly.

Q. About what portion of it?

A. I guess that was ten days' work there.

Q. Did you mean fifty-one or sixty-one days?

A. Fifty-one.

(Testimony of H. T. Tripp.)

Q. And it also included the work done on this trail, starting on the Idaho Placer and crossing the Colorado lode and on up to the Enterprise and Royal? A. It included that trail I spoke of.

Q. Is the Royal, Enterprise and Apex part of it?

A. Part of the Ebner mine?

Q. Yes. [345]

A. No, they are not—I don't know what is part of the Ebner mine now, but it wasn't at that time. They were owned by individuals, or by somebody other than the Ebner Company.

Q. Other than the Ebner Company or the company you were working for? A. Yes, sir.

Q. And you did some of your prospecting up on that ground, on the Royal, etc.?

A. Not that year, I didn't. I did it very nearly that line.

Q. How many days of that fifty-one days was done on the trail, starting on the Idaho placer?

A. About two days, I suppose. I don't know. I couldn't tell you now.

Q. Can you give the Court any more definite idea about the segregation of the remaining days done on those two claims the Parish #1 and Parish #2?

A. I had a man by the name of Emil Capella and another Emil—I can't remember his name; it was a hard name—this Emil Capella was a good prospector and a man I could rely on to send out on that kind of work, and I had him employed for that purpose and he was working up above most of the time. I had him down on the Parish claims doing some

(Testimony of H. T. Tripp.)

work and he was assisted by this other Emil.

Q. I mean, can you give the Court any idea at all about the remaining days of that work—how much was done on the Parish Number 1 and how much was done on the Parish Number 2, and where it was done?

A. There was very little work done on the Parish #1.

Q. Except as the work done on the Parish #2 would tend to run through the Parish #1 and test that ground? A. Yes, sir. [346]

Q. All the work was done for the benefit of both claims?

A. For the benefit of both claims—that was my intention.

Q. Did you do any rock work? A. No, sir.

Q. No underground work at all?

A. I didn't do any underground work or didn't put in any blasts.

Q. Were you still on the property in controversy for the California & Nevada Company at the time you signed this notice?

A. June 20, 1910, yes, sir.

Q. When did you turn the property over to your successor?

A. The third day of August, 1910, I think it was.

Q. Was Mr. Ebner here when you first took charge of the property? A. Yes, sir.

Q. Was he in possession of the property at the time?

A. His watchman was there and had the keys.

(Testimony of H. T. Tripp.)

Q. Did you have a letter to the watchman?

A. I did not,—I spoke to Mr. Ebner. I told him I was ready to go up there and go to work.

Q. Where was Mr. Ebner?

A. I asked Mr. Ebner to go up there on the property and have the keys turned over to me, to my possession, and I went up there and I told Oscar Harri, "From this on you are working for me," and I took the keys to the boarding-house and the office and the mill.

Q. Was there anything said by Mr. Ebner, between you, that led you to believe you were in the possession of the property for him or his company?

A. Mr. Ebner says, "Very well; you can go ahead; anything you want, but," he says, "don't move anything." That was the exact wording that I remember and the circumstances of it, that I [347] was not to take anything away or remove anything from the property.

Q. That is about all that was said?

A. That is about all that was said; yes, sir.

Q. Since then all the expenses and bills have been paid by the California & Nevada Copper Company?

A. Up to the time I left them, yes, all that were paid and all the expenses were paid. I didn't incur any expense on the property that I didn't pay excepting perhaps there might have been two or three dollars or something.

Q. Did you do any work on this water right, covered by this notice of location?

A. No, sir, I did not.

(Testimony of H. T. Tripp.)

Q. What was the day you left?

A. That I left their employ?

Q. Yes.

A. I think I stopped the third day of August, 1910.

Q. Up to that time you had done no work on the water right? A. No, not as located by me.

Q. Do you know anything about the work that has subsequently been done on the Parish lode?

A. No, I haven't been up there at all. I have stayed away from there.

Q. But outside of the work you have described, there was no other work done on the Parish lode up to the time you left? A. Up to the time I left?

Q. Yes. A. I don't know that there was.

(By Judge WINN.)

Q. You didn't pretend to do the assessment work on these Parish [348] claims in 1910?

A. No, sir.

Q. You know that Mr. Ebner, acting for the Ebner Gold Mining Company, had some sort of arrangements with Mr. Underwood by which you were permitted to go on that property,—you knew that at the time you went on there?

Mr. HELLENTHAL.—We object as not the best evidence.

By the COURT.—The objection will be sustained, unless he was present at some conversation between those men—some preliminary questions to determine the test of his knowledge that it is competent evidence.

Q. You had been back to New York, Mr. Tripp,

(Testimony of H. T. Tripp.)

and had become acquainted with Mr. Underwood prior to your going on this property? A. Yes, sir.

Q. And you had conversations sufficient with him and Mr. Ebner to know that it was only by the consent of Mr. Ebner, acting for the Ebner Gold Mining Company, that the Underwood people went upon the property,—you knew that, didn't you?

Objected to as leading. Objection overruled.

A. As far as my work up there is concerned, I have a whole library of instructions in the shape of letters.

Q. I asked about the time that you say you were here and Mr. Ebner was here and he caused the keys to be turned over to you,—I say at that time did you or did you not know that there was some arrangements made between Mr. Ebner representing the Ebner Gold Mining Company and Mr. Underwood—I don't care what Mr. Underwood was representing, but between those two individuals—didn't you know that there was some arrangement made by which you were to go upon that property? [349]

Objected to as not the best evidence. Objection overruled.

A. I had every reason to believe that there was.

Q. You never saw any paper writing concerning it?

A. I never saw the bond for the property, from Mr. Ebner to anybody. I don't know what the reading of that bond was or whom it was to.

Q. You don't know whether it was an option on the property or an option on stock or anything about it?

(Testimony of H. T. Tripp.)

A. No, I do not; no, sir.

Q. Now, about the work on this water right, you know—you have been up there on the property and you know that those people who succeeded you in doing the work up there have done a great deal of work looking towards taking the water out of this creek, at the place where you located the water?

Objected to as leading. Objection sustained.

Q. I ask you if you know if the people who succeeded you, whether you know or not, whether they have done any work looking towards the appropriation and use of that water?

Mr. SHACKLEFORD.—We object as not part of the plaintiff's case.

Objection sustained. Plaintiff allowed an exception.

(By Mr. SHACKLEFORD.)

Q. When you say there was about ten days' work done on the roadway here, do you mean ten days' work with one man or crew?

A. No, I wouldn't call it a crew. I would say that one man would do that amount of work in ten days.

Q. You had several men working there?

A. Yes, sir; I didn't have one man exclusively. I didn't have one man continuously but sometimes there were two men. [350]

Q. When you started out to clean this road up, how big a crew did you put on there? I mean the road leading to the compressor.

A. I had two or three men working there.

Q. You don't remember how long you had them?

(Testimony of H. T. Tripp.)

A. No, I do not.

Q. How many men did you have working on the trail running through the Idaho Placer and the Colorado and on up to the Parish Number one?

A. I had one man working there.

Q. Who was that? A. That was Dewey.

Q. Didn't you have a man working there named Tarpella?

A. That was the man I was trying to think of—he didn't work there, I don't think.

Q. He didn't work on the trail?

A. Not on that trail; no, sir.

Q. These men that were working up here in the vicinity of the Borean pit, was there any arrangement with them about their catching values, about their having any profit if they caught value in the sluice? A. No, sir.

Q. The reason I ask that is I understand there was some report of a conversation in which you were joshing these men about their failure to get anything out of the hole. Do you remember any such conversation?

A. That was in regard to some work done perhaps on the Fractional Placer.

Q. There was a lay up there?

A. There was a lay up there; yes, sir. [351]

Afternoon Session.

[Testimony of Ed Webster, for Plaintiff.]

ED WEBSTER, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. How long have you lived in Alaska?

A. Since 1881.

Q. You were here during the year 1888?

A. Yes, sir.

Q. I have a map and plat here marked Plaintiff's Exhibit "N," which has a series of mining claims upon it, among those is the Parish, Lotta, Taku, Crown Point, Golden Fleece and Millsite lode and Webster Millsite, surveys number, the last two—283 and 76/B, respectively, and also the Humboldt lode. I will ask you if you know where that property is up the Basin. A. Yes, sir.

Q. Did you ever have anything to do with it in the way of an ownership?

A. Well, I located the Humboldt mine and took up the Millsite and Webster Millsite.

Q. You took up the Webster Millsite?

A. Yes, sir.

Q. Do you remember approximately when that was, about what year, when you located the Humboldt lode claim and took up the Millsite?

A. In 1882.

Q. Now, are you somewhat acquainted with the property known as the Ebner Gold Mining Company

(Testimony of Ed Webster.)

property? A. Well, some of it. [352]

Q. Who were the first persons, person or persons, that was the owner of that, that is as far as your memory serves you?

A. When I first came it belonged to Williams and Charles Wells and Dick Harris, and Joe Juneau, I believe, had an interest in it.

Q. Do you know a man that used to be here named Coulter?

A. Yes, sir, I know Coulter.

Q. Now, Mr. Webster, do you know anything about the survey that was made for the patent of this Ebner property, and I will state to you, for the purpose of letting you know the situation, the Lotta lode claim, the Taku lode claim, the Keystone and the Crown Point and the Golden Fleece are all embraced in one survey?

By the COURT.—Is the Golden Fleece included in that survey?

Judge WINN.—I think it is, your Honor.

A. I was there when they made the survey for the claim in 1888.

Q. Who made it? A. Garside.

Q. You were there? A. Yes, sir.

Q. Now, I will ask you if you at that time saw any corner posts or stakes set by Garside when he was making this survey.

A. When they made the survey for them they ran across our Millsite and of course I objected to that, and they told me they just merely wanted to square up their lines—

(Testimony of Ed Webster.)

Objected to. Objection overruled.

WITNESS.—(Continuing.) —and they just said they wanted to square up their lines and they would exclude that piece out from our property.

Mr. HELLENTHAL.—We object as hearsay and ask to have it [353] stricken.

Objection overruled and motion denied. Defendant allowed an exception.

Q. I will ask you to come down to this plat or map and look it over. I have shown this to you before.

A. Yes, sir.

Q. Defendant's Exhibit "N." I will ask you whether or not when Garside was making the survey in or about or across the Webster Millsite you saw any stakes set by him.

A. Yes, I was along with them when they set the stakes.

Q. Just point to this map and tell what stakes you saw—give them by the numbers you saw set there at that time.

* * * * *

Q. You are pointing to the corner post marked 2 on one side and 6 on the other in red ink and purports to be one of the corner stakes common to the Keystone and Crown Point on the upper end line of those two claims?

A. Yes, sir; this one here, I remember that one—that is right opposite our dam.

Q. What do you mean by your dam?

A. Well, we had a dam right there in the creek.

Q. Were you using the water for any purpose on

(Testimony of Ed Webster.)

your mining claim?

A. Yes, sir, we were using it for the mill.

Q. And you built a dam in Gold Creek?

A. Yes, at the head of the falls.

Q. You left there in 1898? A. Yes.

Q. Now, I will ask you if these stakes were in place there when you left. [354]

A. That I couldn't swear to. I suppose they were. I have seen them there quite often and they were in plain sight.

Q. That is, during your ownership of the property you saw them quite frequently?

A. Yes, I went up to see George Bach and Darow.

* * *

Q. That was in 1898?

A. Yes, when they bought the mine.

Q. And had they always been in the same relative position upon the ground in reference to these other objects, or had they been changed, that is, during the time you knew them?

A. No, I don't think they were changed up to the time I left there.

Q. Where did you have your little mill that you worked your property?

A. Right in here; it was located about in here somewhere (indicating).

Q. On the Webster millsite? A. Yes.

Q. Just about the upper end line of the Keystone and Taku lode.

A. Yes, sir; it was about 90 feet from here to the mill.

(Testimony of Ed Webster.)

Q. Ninety feet from what to the mill?

A. Where the bridge crosses here, down to our little mill.

Q. Now, do you remember any other stakes of the Millsite lode or the Webster millsite on the ground?

A. This one here, over here.

Judge WINN.—He is pointing to the stake numbered 1, 3 and 4 at the upper northeast end line of the Millsite lode.

Q. What explanation have you got to make about that?

A. That is where the lode and the millsite intersect and there is a little triangular piece there and the stakes stuck right together,—a little flatiron piece in there. [355] * * *

Q. Do you know where the present fifteen-stamp Ebner mill is? A. Yes, sir.

Q. Do you know when that mill was built?

A. Yes, sir.

Q. What year? A. 1888.

Q. Was there any other mill ever put upon the Ebner property say between 1882 and 1888?

A. No, sir.

Q. Is the mill that is on the property up there now the same mill that was built in 1888? A. Yes, sir.

(By HELLENTHAL.)

Q. Wasn't that mill enlarged at one time?

A. Yes, it has been enlarged; it was built the same size, but left for more stamps at the time it was built, but the stamps have been enlarged.

Q. When was the mill enlarged?

(Testimony of Ed Webster.)

A. I don't remember the year.

Q. About the year?

A. Probably three or four years after it was built, anyway.

Q. And it was built about what time, what year?

A. It was built—I think the mill was finished late in the fall. I know they made a short run in 1888.

Q. In the fall of '88? A. Yes, sir.

Q. And about a matter of four years after that it was enlarged. A. I wouldn't swear to that.

Q. Somewheres along there?

A. Somewheres along there; yes. [356]

Q. The building was enlarged to the extent that the shingles now indicate upon the roof?

A. No, the mill was built the size and left for more room, if I understand it right, and the stamps were put in afterwards.

Q. Now, you say you saw Garside make the survey of the Taku and those other claims.

A. Yes, I was there on the ground—on the group.

Q. The Ebner group? A. Yes, sir.

Q. In making that survey he used an ordinary transit such as surveyors used? A. Yes, sir.

Q. Do you remember his setting up the transit on the different posts and sighting along the lines?

* * * * *

Q. You have had a general knowledge of Gold Creek about that vicinity for a number of years?

A. Not since 1893.

Q. Before that time? A. Yes, sir.

Q. You know where the creek falls down through

(Testimony of Ed Webster.)

the canyon below there? A. Yes, sir.

Q. Is there any chance of that creek changing its course?

Judge WINN.—We object to that as not cross-examination.

By the COURT.—Do you want to make him your witness?

Mr. HELLENTHAL.—I will make him my witness.

Objection overruled.

Q. I will confine my question to the proximity of where the [357] stakes are—the creek up about where the Golden Fleece, the Taku and Keystone lode claims are, the creek has about the same course now as it had then?

A. Where do you mean, up this way?

Q. Yes.

Objected to as too remote. Question withdrawn.

Q. I will make him my own witness and ask him about the creek that flows through the Lotta. You know where the creek flows down across what is claimed by the Ebner Company as the Lotta claim on this map?

A. No; that is down through the canyon. I only know the creek from here.

Q. You have been down through that canyon?

A. No, I have never been through the canyon.

Q. Well, you have seen the canyon?

A. Yes, sir.

Q. You are familiar with the walls and creek of the canyon? A. Yes, sir.

(Testimony of Ed Webster.)

Q. Now, is there any chance of that creek changing its course in that canyon?

Judge WINN.—We object as leading and no sufficient foundation laid. Mr. Webster has not shown knowledge enough of the creek to testify concerning it and he has not testified he knows where the Lotta claim is.

Objection sustained. Defendant allowed an exception.

Q. What are the chances for the creek changing in that canyon? Are they apt to change or not apt to change?

Same objection. Objection overruled. Plaintiff allowed an exception.

A. They couldn't change from the falls to the Snowslide. [358] There is no chance of its changing in there.

Q. No chance of its changing from the falls to Snowslide Gulch? A. No, sir.

Q. Where are the falls situated?

A. Right where the bridge crosses the creek.

Q. Whereabouts is that on this map?

A. That is the bridge there.

Q. That is near the place where the Webster mill-site and the Taku intersect? A. Yes.

Q. That is where the bridge is and where the falls are? A. Yes, sir.

Q. Where is Snowslide Gulch on this map?

A. I don't see it marked there.

Q. Do you know on what claim it is?

A. No, I don't know these claims down here.

(Testimony of Ed Webster.)

Q. Do you know where Snowslide Gulch is on the map now? A. Yes, sir; there it is.

Q. Is it correctly represented on that map?

A. I suppose it is correct—I couldn't swear to that.

Q. I mean, approximately.

A. Yes, sir, the trend of it looks right.

Q. And between the point on the Taku lode, where the Taku lode intersects the Webster millsite and the Snowslide Gulch, there is no chance of the creek changing its course?

A. No, sir, not in the canyon.

(By Judge WINN.)

Q. You have never owned any property along that portion of the creek you have just testified to, between the two points you have mentioned? [359]

A. No, sir.

Q. The consequence is you are not so well acquainted with that part of the creek as you would be where you owned property?

A. Yes, but I have been over the ground, over the ridge there, so many times I am pretty well acquainted with the trend of the creek; that is all.

Q. When were you up there last?

A. I was up there last year, to the Perseverance.

Q. You know along some places up there that the creek is wider than it is at other places?

A. Not in the canyon, what we call the canyon.

Q. But it is not all canyon, is it, down Snowslide Gulch?

A. Pretty near all canyon to the Snowslide Gulch.

Q. Does the width of the creek, that is, the regular

(Testimony of Ed Webster.)

water flow, ever change, that is the width of the water flow? A. I don't think so.

Q. You think the thread of the water is the same width up there all the year round?

A. There may be freshets—there may be a time when the loose gravel will wash one side but it is very narrow all through there.

Q. I am referring to the thread. I mean by that the water, the actual width of the water flow—I don't mean from bank to bank. I mean the whole year around.

A. If I understand your question right, in the same stage of water it would run about the same place.

Q. The water is not the same stage all the year around? A. No, sir.

Q. The water flow up there some seasons of the year is very slight? [360]

A. Yes, sir, it is at times.

Q. And sometimes a freshet? A. Yes, sir.

Q. And when there is a freshet, the absolute width of the flow of the water would be wider, wouldn't it?

A. Well, yes.

Q. Now, I will ask you if you ever commenced at Snowslide Gulch and walked up in the bed of the creek—I mean way down in the canyon and walked up to the point you described on this map.

A. Yes, I have been through there.

Q. When were you through there last?

A. It has been quite a while since I was there. It is probably four years since I was there the last time.

Q. And the other observations that you have made

(Testimony of Ed Webster.)

on that part of the creek that you passed over were made when you were going up and down the Basin road? A. Yes, sir.

(By Mr. HELLENTHAL.)

Q. Of course, the creek is wider at high water than low water. A. Yes, sir.

**Q. But what I want to ask you now is whether the creek is about the same place at high water?*

A. Yes, sir.

Q. That is what I want to know, whether the centre of the creek changes with the changes in the stages of water, you understand. A. Yes, sir.

Q. The centre of the creek remains the same?
[361] A. Yes, sir.

Q. Regardless of the stages of water?

A. Yes, sir.

(By Judge WINN.)

Q. Did you testify that near one of these posts that Garside put in there was a foot bridge or some sort of a bridge?

A. There was a bridge across there—this is the bridge right here, and the wagon road comes right across here and this is on a little knoll which is back of our cabin. Our cabin was right there.

Q. You are pointing to the corner post on the line of intersection of the Webster Millsite with the Takū lode claim? A. Yes, sir.

Q. And that stake you locate and remember it in

*Omitted words do not appear in original Certified Transcript of Record.

(Testimony of Ed Webster.)

relation to its position to the bridge?

A. Yes, you could see it right there at any time.

(By Mr. HELLENTHAL.)

Q. Where is that? A. This one here.

Q. That northerly stake?

A. The road comes there—you can see it right there—it is on a little knoll there back of the cabin.

Q. The stake at the intersection of the Webster millsite and the Taku lode? A. Yes, sir.

Q. How far is that from the creek?

A. It is probably forty or fifty feet there.

Q. It is probably forty or fifty feet from the creek, from the edge of the creek? [362]

A. I wouldn't say that from the bridge there, 40 or 50 feet, but right back of the cabin—the cabin sets about there.

Q. And the bridge is right there too?

A. I never measured it. I should judge that was the distance.

Q. And up from the creek about forty or fifty feet?

A. Yes, sir; you can see it from the back of the house, from the wagon road.

Q. You can see it from the wagon road?

A. Yes, sir.

Q. Standing on the side of a little knoll out from the creek forty or fifty feet and behind the cabin the same distance? A. Yes, sir.

By the COURT.—What was Garside locating a stake between your millsite and the Webster lode up there for, up the side line of the millsite, up near the road?

(Testimony of Ed Webster.)

A. I don't know what he put that one there for. It was all hewed out and brushed out and I was over the lines when they stuck the stake there, that is all. I objected to them putting them down on the other side because I thought they were unfair with our millsite.

(By Mr. HELLENTHAL.)

Q. Which side of the creek is that post—the south-westerly side, is it not? I mean the intersection post of the Taku.

A. That is on the right-hand side going up.

Q. They are all on the same side?

A. The other one is on the other side—this one is across the creek—

Judge WINN.—This one—he points to the one marked 2-6.

Mr. HELLENTHAL.—The common stake of the Millsite and Webster lode—and the other one?
[363]

A. That is on the left-hand side going up and the other is on the right-hand side.

Q. The one on the right-hand side is a stake that crosses on the northerly end of the Taku lode, at the point of intersection of the Webster Millsite, on the southerly side of the creek?

A. Yes, sir, the right-hand going up.

Q. And the common point of the Crown Point and Keystone is also on the southerly side?

A. Yes, sir.

Q. The stake that Garside set where the Millsite Lode and the Webster Millsite join on the southerly

(Testimony of Ed Webster.)

end line, that is, on the other side?

A. Yes, sir, that is *acrosses*.

Witness excused. [364]

[**Testimony of B. M. Behrends, for Plaintiff.**]

B. M. BEHREND, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Your name is B. M. Behrends and reside in Juneau. How long have you been here?

A. Since 1887.

Q. And what business have you been engaged in during that time principally?

A. Merchandising and banking.

Q. I will ask you if you were ever a stockholder or officer in the Ebner Gold Mining Company.

Mr. SHACKLEFORD.—We object as not the best evidence and immaterial. Objection overruled. Defendant allowed an exception.

A. I was.

Q. And did you ever own any stock in that company?

Same objection. Objection overruled. Exception allowed.

A. I did.

Q. I will ask you if you are acquainted with what is now the 15-stamp mill that is on the Ebner property, which has been referred to throughout this case as the William M. Ebner mill—you know where that mill is? A. Yes, sir.

(Testimony of B. M. Behrends.)

Q. Do you know when that mill was built?

A. I think in 1888.

Q. Do you know whether or not it was built its present size—I don't mean in reference to stamps, but the outside of the building?

A. I am quite sure it was.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. You are not sure? [365]

A. I think so, as far as my recollection goes.

Q. To the best of your recollection, that is true?

A. Yes, sir.

Q. But you don't know whether your recollection is correct on that point or not?

A. No, I wouldn't be sure. Some addition may have been put to it.

Mr. SHACKLEFORD.—That is all.

Witness excused. [366]

[Testimony of Charley Wells, for Plaintiff.]

CHARLEY WELLS, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Your name is Charley Wells and you are a resident at Juneau? A. Yes, sir.

Q. How long have you been in Juneau?

A. Since the fall of 1880.

Q. Do you know where the present mill is on the Ebner property? A. Yes, sir.

Q. Do you know when that mill was built?

(Testimony of Charley Wells.)

A. Yes, sir.

Q. What year? A. 1888.

Q. Do you know who built it?

A. Sam Coulter—well, Mr. Van Brunt was the superintendent.

Q. You heard Ed Webster's testimony a while ago? A. Yes, sir.

Q. Do you know where the Humboldt mill is up there? A. Yes, sir.

Q. Do you know when that was built?

A. I do.

Q. When was it?

A. I think in 1883, 1882 or 1883—I don't know which. I think it was 1882 they started in. I don't know whether they finished it or not that year.

Q. Do you know with respect to the present size of the Ebner mill—I don't mean the number of stamps in it but the size of the building, whether it has been changed or not?

A. Mr. McLaughlin told me— [367]

Q. When did you first see it?

A. It was built for fifteen stamps and they only put in ten.

Q. When did you first see the mill building after its completion?

A. I think they started in the latter part of July—they finished the road up here first on this side, the right-hand side going up and built a bridge across the Snowslide.

Q. Do you know whether or not the mill has always been the same size? I mean the building.

(Testimony of Charley Wells.)

A. To my knowledge it ain't any bigger now than the day it was put up. Just about the same size.

Q. It was first a ten-stamp mill? A. Yes, sir.

Q. And then there were five stamps added?

A. Yes, there were five stamps added to it, I suppose. I never was in the mill since Ebner took it.

Q. You have seen it, passing up and down the road there a good many times? A. Yes, sir.

Q. What is the approximate size of that Humboldt mill—do you know that—the size of what is called the Humboldt mill up there?

A. A five-stamp mill.

Q. That is the one Mr. Webster spoke about?

A. Yes, sir.

Q. You heard his testimony? A. Yes, sir.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. With reference to where the Ebner mill now is—you are acquainted with the Lotta location?
[368]

Objected to as not proper cross-examination. Objection overruled. Plaintiff allowed an exception.

A. I don't know a patent stake on the ground.

Q. You were one of the original locators on this hillside?

A. I located the Taku, Keystone, Crown Point and Golden Fleece and helped to locate the Grand Review.

Q. You spent a good deal of time on the hillside?

A. I spent eight years there.

Q. During what years?

(Testimony of Charley Wells.)

A. From the spring of '81 to the fall of '88, until I sold out.

Q. Is the Lotta claim in the same position now, as indicated upon this map, as when you first knew it, with reference to the position of the Ebner mill?

Objected to as not cross-examination.

Objection sustained. Defendant allowed an exception.

Witness excused.

Judge WINN.—I have here, Mr. Hellenthal and Mr. Shackelford, a book termed “Manual of Instructions.” Do you desire me to make any further identification of that book than shown upon the face of it, on the first page?

Mr. SHACKLEFORD.—I certainly do. We require the Manual of Instructions that were in force at the time these surveys were made.

Judge WINN.—I will call Mr. Hill for further redirect examination. [369]

[Testimony of Lloyd Hill, for Plaintiff (Recalled).]

LLOYD HILL recalled:

(By Judge WINN.)

Q. You were on the witness-stand the other day on both direct and cross-examination. I omitted on redirect examination to put some questions to you on matters brought out on the cross-examination. Mr. Hellenthal asked you something about your having been in some way or other connected at one time with the location of what is known as the Oregon claim?

A. Yes, sir, he did.

Q. You know a man named Nevins?

(Testimony of Lloyd Hill.)

A. I do.

Q. Who accompanied you at the time you marked out the boundary lines of the Oregon claim?

A. Garside and my brother and one other assistant, I think, and myself.

Q. Did you see this man named Nevins up there at any time during the staking out of the claim?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. All the arrangements were made for the location of the claim with Mr. Nevins at the Alaska-Juneau mine and at my office in Juneau, Alaska—Garside & Hill's offices, in Juneau.

Q. What was Mr. Nevins engaged in at that time, what business?

Same objection. Objection overruled. Defendant allowed an exception.

A. He was superintendent of the Alaska-Juneau mine.

Q. The Alaska-Juneau mine—where is it located, the buildings and mills? [370]

A. The mills and buildings are located on the south side of Silver Bow Basin, about three miles and a half from Juneau.

Q. I will ask you, at the time you were making this location, if you had any conversation with Mr. Nevins about the location, one way or the other?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial and hearsay.

(Testimony of Lloyd Hill.)

Objection overruled. Defendant allowed an exception.

A. I did.

Q. What was that?

Same objection. Question withdrawn.

Q. Now, this claim, from the location notice, apparently was taken in the name of J. P. Corbus. I will ask you if Mr. Corbus was on the ground and had anything to do about the location of the claim as far as you know.

A. Had nothing to do with the location.

Q. Did you have any conversations with Mr. Corbus one way or the other concerning the location of the claim? A. No, sir.

Q. Did you ever have any conversation with Mr. Corbus about the location of the claim?

A. No.

Q. At whose request, then, was it that you and Garside went up there and made the location?

A. The request of Mr. Nevins—Archibald Nevins.

Q. And he was then superintendent of the defendant company in this case, the Alaska-Juneau Gold Mining Company? A. He was.

Q. Now, then, I will ask you to state what this conversation was that you had with Mr. Nevins at the time you made the location [371] or any time thereafter, concerning this location.

Mr. HELLENTHAL.—We object as hearsay, incompetent, irrelevant and immaterial.

Objection sustained. Plaintiff allowed an exception.

(Testimony of Lloyd Hill.)

Mr. HELLENTHAL.—We will admit that Mr. Nevins was the superintendent of the Alaska-Juneau, and whatever instruction he gave to Mr. Hill was as the agent of the Alaska-Juneau Company.

Q. What conversation, if any, did you have with Mr. Nevins at the time of the location of the claim?

By the COURT.—What do you expect to show by this witness?

Judge WINN.—I expect to show by this witness that Mr. Nevins became aware of the fact that this property was staked over prior locations and that both Nevins and afterwards Mr. Joseph McDonald, the superintendent of the Alaska-Juneau Company, abandoned this claim. I will prove also by Mr. Ebner that Nevins told him that he would go and pull up his stakes and he went and pulled up his stakes to avoid any conflict with the Lotta, ostensibly over on the Lotta or Parish No. 2; and then we will show further on, we expect to show by Mr. Hill, that when he took his instructions from Mr. McDonald that he was then superintendent of the Treadwell Mine and the defendant company, and after the title had been conveyed from Corbus to this company, that when he surveyed the Colorado claim that he had a conversation with Mr. McDonald about any other surveying to be done up there, and McDonald told him that he didn't want anything done with any other claim except the Colorado.

By the COURT.—Your offer is getting too large for the present question. If you can show by the witness that after locating the Oregon that he was

(Testimony of Lloyd Hill.)

directed to pull up the [372] stakes, you may show that, but I don't believe that Nevins, the scope of his authority was such that he could omit away a title. His employment might be such, being superintendent or manager or whatever he was, to direct this witness to go and pull up those stakes and effect an abandonment in that way by his actions, but to go to work and in a general conversation omit away the title to this property—I don't believe you can show that.

Judge WINN.—I don't believe I can state just the conversation he had—if you will permit me to have Mr. Hill tell it—

By the COURT.—Mr. Hill may answer, if he understands the ruling of the Court regarding the parts of the conversation that are admissible. If he answers wide of that mark it will be stricken out.

A. The conversation was short. In the main, Mr. Nevins said that he found out that the Oregon location conflicted with a claim claimed by Mr. Ebner up Gold Creek and he didn't care to have any litigation in regard to it; that was the first conversation. He asked me why I made the location there that way. I said I didn't know at that time that the ground was not subject to location,—that I knew nothing of the Ebner location or the Parish Number 2 lode.

Q. Was that all the conversation you had with Mr. Nevins? A. Yes, sir; I think it was.

Mr. HELLENTHAL.—We move to strike for the reasons stated—because it is not an admission within

(Testimony of Lloyd Hill.)

the scope of Nevins employment and authority, and hearsay testimony.

By the COURT.—I hardly think that Nevins' statement to him afterwards, when he found out the mistake, would be tending to explain his conduct at the time he made it. They tried [373] to impeach him by showing he went on there and made the survey without telling them and this does not explain that at all. The motion to strike will be granted.

To which ruling plaintiff is allowed an exception.

Q. Mr. Hill, Mr. Hellenthal interrogated you considerably about what is called the Colorado claim and the survey of that claim. I will ask you who was the superintendent of the Alaska-Juneau Gold Mining Company, the defendant in this case, at the time you made the survey of the Colorado claim?

Objected to. Overruled. Defendant allowed an exception.

A. I am not absolutely certain but all arrangements for the survey were made with Mr. McDoanld.

Q. Joseph McDonald? A. Yes, sir.

Q. What position was he acting in then?

A. He was the superintendent of the Alaska-Treadwell Consolidated group of mines.

Q. Do you know whether he had anything to do with the Alaska-Juneau mines at that time?

A. I think he was superintendent of that also.

Objected to as not the best evidence. Objection overruled.

Defendant allowed an exception.

Q. What conversations did you have, if any, with

(Testimony of Lloyd Hill.)

Mr. McDonald about making the survey of this Colorado claim?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial and hearsay.

By the COURT.—He may answer. You may raise the question on a motion to strike.

A. He sent for me as to what claims to survey for patent at [374] the head of Last Chance Basin, the Alaska-Juneau claims. He asked me in regard to the work that had been done on them and I told him and explained the situation of the Oregon, its conflicting with those locations of Ebner's, and he said, "We will not survey the Oregon for patent." He says, "We will survey the Idaho and Colorado for patent and better throw that Oregon location up, anyway"; that was all.

Mr. SHACKLEFORD.—We move to strike the answer because it is not binding upon the defendant company.

By the COURT.—Unless you can show that Mr. McDonald was superintendent or manager of the Alaska-Juneau, it will be stricken.

Judge WINN.—I will follow that up but I can't do it with Mr. Hill.

By the COURT.—Unless you can connect it, it will be stricken.

Mr. HELLENTHAL.—We move it be stricken as hearsay. There is no evidence now anywhere which can be offered to show that Mr. McDonald had authority to abandon the property of the Alaska-Juneau.

(Testimony of Lloyd Hill.)

Mr. SHACKLEFORD.—We will also ask to strike the last sentence of the witness' answer after he refers to the directions for the survey to letting the Oregon go, for the reason that no authority is shown from the company to Mr. McDonald to make such a declaration or commit such an act on their part. It is paramount to the surrender of title.

By the COURT.—Mr. Nevins' conversation was a general conversation, not connected with the work, and I struck that out, but this is on the offer of plaintiff's counsel to show the general authority of Mr. McDonald. This will be allowed to stand, but will be stricken out if he fails to [375] show the general authority of McDonald to represent the defendant company.

Q. Mr. Hill, are you well acquainted with the creek-bed and the creek at or near Corner Number 2 of the Lotta lode claim, etc.?

* * * * *

Q. How long have you been acquainted with the kind of implements and the chains, etc., they use here in surveying? A. About thirteen years.

Q. How were the methods and means of measurement, etc., when you first came here?

A. They were not as good as they are now by any means.

Cross-examination.

(By Mr. HELLENTHAL.)

* * * * *

Q. Mr. Nevins is dead? A. I don't know.

Q. He is not in the country, anyhow?

(Testimony of Lloyd Hill.)

A. He is not in the country.

Q. You haven't seen him for many years?

A. No, I haven't seen him for many years.

Q. Mr. McDonald has left the country?

A. Mr. McDonald is out of the country.

Q. Down in Mexico somewhere?

A. Yes, I think so.

Q. Mr. Hill, I will ask you this question. When you went up there to stake the Oregon lode claim for Mr. Nevins, as you testified, Nevins told you to go up there? A. Yes, sir.

Q. Mr. Nevins was acting in the capacity of superintendent of the Alaska-Juneau company when he asked you to do it? [376]

A. Yes, sir.

Q. And you went up there to locate a—to stake a lode claim for the Alaska-Juneau Company at the request of Mr. Nevins? A. Yes, sir.

Q. And you did stake a lode claim? A. I did.

Q. You staked a lode claim along the lines indicated by the Oregon location notice? A. I did.

Q. You put the four corner posts in the ground?

A. I did.

Q. At the points indicated by the measurements on the location?

A. I think I put five corner posts in the ground.

Q. Can you state where the four corner posts were put?

A. One post was put down at Corner 3, identical with corner 3 of survey 142—that would be the south-west corner post of the Oregon location, indicated

(Testimony of Lloyd Hill.)

on the map, Exhibit "N"—

Q. It shows here on this map as the northwesterly corner post of the Colorado—that is the identical post? A. Yes, sir.

Q. That is one of the posts you set that day?

A. Yes, sir.

Q. Where is the other one?

A. The other stake extends in a northeasterly direction, extended, at that time, 1500 feet, I think, and was placed on the end line of the Forrest lode.

Q. Can you locate it on the map here?

A. It is located on the west end line of the Forrest lode, survey 545. [377]

Q. Put a little mark there of some kind to indicate where it is? A. It is about in here.

Q. Put the letter "A" there.

(Witness does so.)

Q. A on exhibit "N" is what you testify to?

A. Yes, sir.

Q. Where did you put any other stake?

A. I then put another stake, I think, a hundred and some odd feet in a northeasterly direction. It would be the northeast end line of the Oregon, where it intersects the Lotta lode, as the same now stands upon the ground.

Q. Please put a letter "B" there.

(Witness does so.)

Q. Now, put the letter "C" where you put the next stake?

A. I then ran down five hundred and some odd feet down on the side line of the Lotta claim, I think.

(Testimony of Lloyd Hill.)

Q. Put the letter "C" there.

(Witness does so.)

Q. Now, run down to where you put the next stake and put the letter "E" there.

A. I put the next stake on the north side line of the Colorado lode, at the point I mark "E" on exhibit "N."

Q. Now, those four stakes were put there by you for the Alaska-Juneau Company at the request of Mr. Nevins? A. Yes, sir.

Q. That was in the fall of '99. A. Yes, sir.

Q. Do you know in what month?

A. No, I wouldn't be certain about the month.

Q. When you located those stakes there and located that claim [378] did you see any lines brushed out that you crossed—did you cross any lines that were brushed out that you saw?

Judge WINN.—I object to that. It is not proper cross-examination. Objection overruled. Plaintiff allowed an exception.

A. I don't recollect that I did; no, but then I didn't travel around the entire side and end lines of the Lotta claim.

Q. You went from stake to stake?

A. Yes, but I couldn't go direct from stake to stake. I had to traverse around more or less. It is impossible to go over some country.

Q. It is a country that has a lot of brush in it?

A. Yes, sir; and a lot of rocky precipitous hillsides.

Q. You didn't see, however, any lines brushed out in this brush as you walked around?

(Testimony of Lloyd Hill.)

A. I saw—the lines that I saw brushed out were the Lotta line. I saw that—that would be the line 5-6 of the Lotta claim.

Q. You remember seeing that brushed out?

A. Yes, sir; that was brushed out.

Q. But no other lines you remember as being brushed out on that? A. No, sir.

Q. You crossed in locating that claim, you traversed, the side lines of the Parish #2 as located on this ground, did you not?

A. I did of that portion between stakes, between stake "B" and stake "C," which is identical with the Lotta side line.

Q. When you went to stake "E," did you get there?

A. When I went to stake "E," I went down to the Last Chance corner, which is marked here—that would be the southwest corner of the Oregon, and ran up along the Colorado side line, the north side line.
[379]

Q. When you started, commencing at the beginning point where you started your survey, you ran a line then to the point you have marked here with the letter "A"—you ran a line from where you started?

A. No, I didn't run that line right there.

Q. How did you run it?

A. I had points on the road that I knew the position of that point and from plats that I had in the office.

Q. You, however, crossed the side line of the Parish as now located?

(Testimony of Lloyd Hill.)

A. Yes, I crossed the side line of the Parish.
(By Judge WINN.)

Q. Mr. Hellenthal asked you if Mr. Nevins was out of the country and Mr. McDonald out of the country. I will ask you, along here several months ago, last August, at the time we were making application for a restraining order in this case, if you didn't there make an affidavit and testify both as to the fact of the conversations you had with Mr. Nevins and Mr. McDonald?

A. I think I did; yes, sir.
(By Mr. HELLENTHAL.)

Q. Did you or did you not at that time testify to these conversations, in an affidavit or otherwise—did you or did you not?

A. I think I did, yes, sir,—I am of that opinion.

Q. How sure do you think about that now?

A. I am pretty sure of it. I don't remember the sum and substance of them, but they were along the line I testified to here. [380]

Q. Did you testify as to the conversation with Nevins, either by affidavit or otherwise?

A. I think so; yes, sir.

Q. Do you remember now how you did it—by affidavit or otherwise—whether it was by affidavit or otherwise?

A. I think I told it in both the affidavit and testimony.

Q. Told it both ways? A. Yes, sir.

Q. The conversation you had with Nevins?

A. Yes, sir.

(Testimony of Lloyd Hill.)

Q. Now, you are pretty sure about that?

A. I am pretty positive.

Q. How about this McDonald conversation—by affidavit or otherwise, or oral testimony?

A. I am of opinion that was on the stand.

Q. When you say you are of opinion, are you pretty sure you so testified on the stand?

A. I am pretty sure.

Q. Your recollection on that question is pretty clear, quite clear? A. Yes, sir.

Q. And clear enough on it to go on oath and testify that you did so testify?

Objected to. Sustained.

Witness excused. [381]

[Testimony of Martin George, for Plaintiff.]

MARTIN GEORGE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Where do you live? A. Juneau.

Q. How long have you lived in Juneau?

A. With the exception of a few years in Sitka since 1897.

Q. What business have you been engaged in since 1897 principally?

A. I was mining up to 1901. Since then I have been in the surveyor general's office.

Q. You have been in the surveyor general's office since 1901? A. Yes, sir.

Q. In what capacity have you been in the surveyor

(Testimony of Martin George.)

general's office? A. Chief draughtsman.

Q. I will ask you, Mr. George, if being in the office doing the work you have testified concerning, if you have become familiar with the instructions and rules and regulations, etc., pertaining to government surveys—mineral and nonmineral.

A. I presume so; fairly well, yes, sir.

Q. Have you been requested some time this afternoon by Mr. Burton to search in the office of the surveyor general to ascertain whether or not any rules or regulations, in any authentic form, as they existed in 1888 are in that office? A. Yes, sir.

Q. Could you find any? A. There were none.

Q. The oldest manual of rules and instructions was what?

A. 1895, I think—'95 or '96. It is 1895. The surveyor general's [382] office was only established in Alaska in 1897.

Q. Prior to 1897, what official did that business?

A. The United States marshal was ex-officio surveyor general.

Q. When the duties of that office were turned over to your office, did they turn the records of the other office over to your office?

A. I was not in the office at that time, but there were very few records turned over.

Q. Are you one of the custodians of the records down there, of the surveyor general's office?

A. Of the plats and field-notes.

Q. When Mr. Burton went down there this afternoon you looked through the office and the records of

(Testimony of Martin George.)

the office, papers and files, did you, to find out whether or not you had any such rules and regulations that dated further back than 1895?

A. I knew there were none other than those.

Q. You know that now?

A. I knew there were none other than I gave to Mr. Burton.

Q. This manual I will have identified—this is the one Mr. George testifies to as being dated 1895. It is marked for identification, Plaintiff's Exhibit "P."

Judge WINN.—If I desire to offer any of the rules or regulations from it later on, I will offer them to the Court, to be read into the record.

Mr. SHACKLEFORD.—We will ask the Court to have it introduced in connection with the testimony of the witness.

By the COURT.—It is now in the custody of the Court and the Court will hear you later regarding anything you wish to offer.

Q. I will hand you a little red book marked "Manual of Instructions for the Survey of the Mineral Lands of the United [383] States," dated in March, 1909. I will ask you what that book is.

A. It is the latest mineral manual that has been issued.

Q. Those rules and regulations are the rules and regulations and instructions that govern your office now? A. Yes, sir.

Q. Is there any other set of officials that these rules apply to and the instructions?

A. Mineral surveyors.

(Testimony of Martin George.)

Q. I will have this identified at this time and later on I will examine into what I desire to offer.

It is marked for identification, Plaintiff's Exhibit "Q."

Q. Are any duties incumbent upon you by virtue of the position you occupy with the surveyor general, such that you have anything to do with the return of either deputy mineral or land surveyors—surveys that they make of different lands in Alaska?

A. I examine the returns; yes, sir.

Q. Now, I ask you, in case of a mineral survey, if there are any errors made in it, what is done with that survey with respect to correcting those errors?

A. It is sent back to the deputy.

Q. Suppose, Mr. George, that after a survey leaves your office and is forwarded to the Commissioner of the General Land Office at Washington, D. C., on application for patent, and if that office there happen upon some errors which your office has overlooked or some corrections they desire to have made, what then does the general land office do with that survey?

Mr. SHACKLEFORD.—We object to that. It refers to the present practice. If the witness is qualified to testify to the [384] practice at the time the surveys in question took place, that would be different. The witness is not qualified.

Objection sustained. Plaintiff allowed an exception.

Q. Do you know anything about what the practice was in 1888 in respect to the question of the—the question I asked you? A. I do not.

(Testimony of Martin George.)

Q. You know what it is since you have been in the office of the surveyor-general? A. Yes, sir.

Judge WINN.—Now, I ask that the witness be permitted to answer the question the Court ruled out.

By the COURT.—Make your offer.

Judge WINN.—We offer to prove by this witness that ever since he has been connected with the surveyor-general's office, that the practice is that if after the survey has been made and approved and after the papers are forwarded to Washington to the commissioner of the general land office, any errors are discovered, that then the survey is sent back either to the surveyor general for correction, if it can be done by him, and if not it has to be sent to the field surveyor, the deputy, to make such corrections as directed by the commissioner of the general land office.

By the COURT.—On the objection of defendant the offer will be denied.

Plaintiff allowed an exception to the ruling.

Q. I present to you Plaintiff's Exhibit "O," which is a certified copy of a certain survey containing quite a number of claims, and I will ask you if at the time that this plat, or the original of this plat, together with the field-notes, etc., were forwarded to the Land Office at Washington City, [385] any errors had been discovered, would they undertake to correct it there or would it have been sent back here for correction?

Objected to for the same reason.

By the COURT.—The qualification of the witness

(Testimony of Martin George.)

to testify to the fact has not been shown. Objection sustained.

Judge WINN.—If your Honor holds I should go back to 1888, I cannot do it.

By the COURT.—These matters taking place between the time this survey was made and the time this witness came into the office renders it doubtful whether the practice might have been the same, so I will sustain the objection.

Plaintiff allowed an exception to the ruling of the Court.

Q. Have you anything in your office in the way of records that would show as to whether or not the plat which you have in your hand, which is Exhibit “O,” is a certified copy of the plat upon which the patent was granted in that case?

Mr. SHACKLEFORD.—We object to that as not the best evidence.

By the COURT.—It is preliminary. Objection overruled.

A. This is a copy of the official plat in the case of the survey on which the patent was granted.

Witness excused.

Whereupon court took a recess until Wednesday, May 31, 1912, at 10 A. M. [386]

Wednesday, May 31, 1912—Morning Session.

[Testimony of Al Black, for Plaintiff.]

AL BLACK, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your name? A. Al Black.

Q. Where do you reside? A. Juneau.

Q. How long have you lived in Alaska?

A. Since 1892.

Q. What has been your business generally during this period of time—what have you been engaged in in Alaska?

A. Well, I have been teaming, mining,—most anything.

Q. You are somewhat acquainted with what is known as the Ebner property up here in Silver Bow Basin, the Ebner Gold Mining Company property.

A. Yes, sir.

Q. I will ask you if you know anything about the time that some negotiations were going on for settling some disputed matter between Mr. Ebner's company and the Alaska-Juneau Company over some portions of the Colorado mining claim, which conflicted with the Parish #1 mining claim?

A. Yes, I know something about that.

Q. Do you remember who was acting as attorney for Mr. Ebner in that case?

A. At that time I think it was Judge Lyons.

Q. Did you ever take Judge Lyons up there on this

(Testimony of Al Black.)

property to show him any stakes that are on the property?

A. No, I didn't take him up there. I was working for the Alaska [387] Transfer Co. then and I ain't sure whether he went up with Mr. Ebner in the wagon or they walked up, but they were there and I was there when they were talking about the stakes.

Q. I will ask you whether you went over on the ground at that time to look for any stakes with Mr. Ebner and Judge Lyons?

A. No; I was right there on the road.

Q. You were not working for the company at that time but were in the Transfer business and took them up in a wagon? A. Yes, sir.

Q. You know where the Ebner dam is on Gold Creek up above the Ebner mill? A. I do.

Q. Is the dam that is there for the purpose of an intake to the new flume-line the same as the old dam or has it been rebuilt or changed any?

A. Well, it is practically the same dam; it is changed some.

Q. In 1910 did you do any work under Mr. Mackey on this property? A. I did.

Q. Do you remember about the date that you commenced to work up there under Mr. Mackey in 1910?

A. The 11th day of August.

Q. What work did you commence performing up there at that time?

A. I started in brushing up a clearing and right of way for the flume-line.

Q. What flume-line?

(Testimony of Al Black.)

A. A new flume-line that they built for the new building or was supposed to be for the new mill.

Q. Now, whereabouts on that flume-line on the 11th of August did you commence to work? [388]

A. Right at the dam.

Q. That is the Ebner dam?

A. Yes; I started in clearing the right of way right there.

Q. What, if anything, was afterwards constructed over that right of way that you were clearing out?

A. Well, there were several things. There was a tent put up there and there were several fences built there across it.

Q. What did the company that Mr. Mackey was working for, what work did they do, if anything, over this flume-line that you commenced clearing up—did they use it for any purpose?

A. They built a flume there.

Q. That is that new high line flume?

A. Yes, sir.

Mr. SHACKLEFORD.—We object to that as immaterial and move to strike.

By the COURT.—Its materiality is rather doubtful in this case, but if you don't go into it too extensively, it may stand.

Q. How long through the summer of 1910 did you continue in the service of Mr. Mackey doing work in and upon this property?

A. Well, I started in there on the 11th day of August and I worked there all that year—all last

(Testimony of Al Black.)

year and some time in January I went away from there.

Q. I would ask you, Mr. Black, if while you were in the service of Mr. Mackey performing this labor upon this property, if you became acquainted with a little cabin on the right-hand bank of the creek as you go up the creek, from which cabin there is a brushed-out line across the creek to the other side, from the creek up to the road—do you remember any little cabin down there on that brushed-out line across the creek? [389]

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial, unless it is on the property in controversy.

Objection overruled. Defendant allowed an exception.

A. Yes, I know where that cabin is.

Q. Now, did you have anything to do with brushing out that line across the creek? A. I did.

Q. What, if any, work did you do on that in 1910?

A. Well, I brushed out the lower side line of the Lotta claim.

Mr. SHACKLEFORD.—We move to strike that out as incompetent, irrelevant and immaterial.

By the COURT.—It may be preliminary. Objection overruled and motion denied. Defendant allowed an exception.

Q. I ask you, about that cabin that you said a while ago you saw on the right-hand side of the creek as you go up there, if there is any stake there that you ever saw near the cabin.

(Testimony of Al Black.)

A. Well, there is not right at the cabin—a little ways from the cabin there is a stake of the Lotta.

Q. Now, with reference to that stake and the cabin, I understand the line you brushed out was brushed out clear out across the creek, up to the creek and also on the left-hand side of the creek? A. Yes.

Q. That is the line you have reference to that you worked on? A. Yes, sir.

Q. Now, did you during your work up there become also acquainted with any stakes that were claimed to be the stakes of the Parish #2 lode claim?

A. Yes, I did. [390]

Q. You know Mr. Kenzie? A. Yes, sir.

Q. And you know Mr. Kennedy, the assistant superintendent of the Treadwell Company?

A. Yes, sir.

Q. Now, during the summer of 1910, what time did you observe either one of these gentlemen and a man by the name of Burch up there on any of the property which you have referred to as the Lotta property and the Parish #2 lode claim?

A. The first time I seen Mr. Kennedy or Mr. Kenzie, I think it was the 26th—I mean Mr. Kenzie and Mr. Burch—it was the 26th.

Q. About the 26th of what month?

A. Of September.

Q. Did you ever about that time, either before or after the 26th, right along about that time, see Mr. Kennedy up there also?

A. I saw Mr. Kennedy, I think it was the first of October.

(Testimony of Al Black.)

Q. You say on or about the 26th of September you saw Mr. Kenzie and Mr. Burch—where were they up there when you saw them?

A. I saw them up on what is known as the Lotta claim—they came up there.

Q. Did you have any conversation with either one of them at that time?

A. I had a conversation with Mr. Kenzie.

Q. Concerning this property and as to who was in possession of it, etc.

Objected to as leading. Objection sustained.

Q. What was the conversation you had with Mr. Kenzie in reference to it?

Mr. SHACKLEFORD.—We object to the form of the question as calling [391] for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

Q. (By the COURT.) Did you have more than one conversation with him?

A. Yes, I did, that day.

Q. What was the first conversation with him?

A. He came up there—one of the boys had been blasting up there.

Q. Now, when you say one of the boys, whose boy do you mean? A. One of the Ebner men.

Q. He had been blasting where?

A. He had been blasting on the hillside.

Q. On what claim? A. On the Lotta claim.

Q. Now, go on and tell the conversation you had with Mr. Kenzie—was Mr. Burch present?

(Testimony of Al Black.)

A. Yes.

Q. Go on and tell the conversation.

By the COURT.—Who is Burch?

Judge WINN.—It will be shown later on.

Mr. SHACKLEFORD.—He is one of the engineers of the company.

A. I was there on the Lotta claim sitting down talking to this Middleton and, I think, Seitz, when Mr. Kenzie and Mr. Burch came up. Kenzie was about, I should judge, forty or fifty feet ahead of Burch, and he says, “Who fired that shot?” and I says—

Mr. SHACKLEFORD.—I don’t see the materiality of this evidence, about an altercation between the parties—

By the COURT.—Only as it bears on the matter of possession—

Objection overruled. Defendant allowed an exception.

Q. Go ahead and tell the conversation or substantially what was said there. [392]

A. He says, “Who fired that shot—did you fire it?” Al and I says, “No; who fired it?” and I pointed to Middleton, and he started over after Middleton, and I told him—I says, “Here, Mr. Kenzie, don’t jump that kid,” I says, “if you want to jump anyone, jump me,” or something to that effect, and I says, “He is only a boy and done as he was told,” and then we had some words there and I told him, I says, “I am only working here for wages, and the best thing you can do is to go up and see Mr. Mackey—Mr.

(Testimony of Al Black.)

Mackey is running it and I am working under him," and he says, "Where is Mackey?" And I says, "He was up at the blacksmith-shop when I came down." "Well," he says, "we will go up and see him," and I says, "I would go along with him," and we went up there and Mr. Mackey wasn't there, and I thought maybe he was over on the grade and we went over on the grade, and they said he had just gone down the road; so we went over—or I told Mr. Kenzie he had just gone down the road and if he hurried up he might catch him, or something like that, so he said he would go and see him and make some arrangements with him. I told him I would see Mr. Mackey when I went down that night and whatever agreement they came to why I would do as Mr. Mackey said, or something like that, and he said he wanted their men to work there, and I told him they couldn't work or I wasn't going to let them work. He said he hadn't time to go down and tell them and see Mackey, and he asked me if I would go down and tell them, and I went down and told them to keep away and not work there—that we were going to be blasting.

Q. That is, you told the Kenzie men?

A. Yes, and that he would see Mackey and they would come to some arrangement; that was on the 26th. [393]

Mr. SHACKLEFORD.—We move to strike all that testimony as incompetent, irrelevant and immaterial.

Motion denied. Defendant allowed an exception.

(Testimony of Al Black.)

Mr. SHACKLEFORD.—We ask the Court to take judicial notice, and to refer in the record to the complaint in Number 803-A filed August 25, 1910, particularly to the allegations contained in paragraph 3 of that complaint, together with the other proceedings in that case, showing it was followed up immediately with an application for an injunction to enjoin us from going on the premises, which injunction was denied.

By the COURT.—It is so ordered.

Q. You know where the Kenzie people afterwards constructed their dam across Gold Creek?

A. I do.

Q. Now, where were the Kenzie men working on this 26th day of September, the time you had these conversations, with respect to where they ultimately built the dam?

A. Well, they were just on this side of the creek—

Mr. SHACKLEFORD.—We make the same objection. Objection overruled. Defendant allowed an exception.

WITNESS.—(Continuing.) No, it was the other side of the creek, over here (indicating).

Q. Would their work be above their dam or below their dam, where it was finally constructed?

A. Well, they were taking it down—the timber—from the road down towards the dam, or trying to.

Q. Where were they taking the timber down with reference to any of the buildings of the Ebner Company up there?

A. You know where the compressor is?

(Testimony of Al Black.)

Q. Yes. [394]

A. It was below the compressor—taking it down over the Jualpa Company high line flume.

Q. Now, where were Middleton and the people under Mackey working with reference to where the Treadwell people afterwards put in this dam—not the Treadwell but Mr. Kenzie's people?

Same objection. Objection overruled. Defendant excepts.

A. There were other men working—there was Middleton and Graham and McKenna were working down there on the tunnel on the Parish #2 claim, and there was Seitz and John Carlson, they were working on the upper—above there—cutting out a line and brushing and cutting a trail.

Q. Where were they working with respect to this line that you say you helped to brush out as was referred to as the lower line of the Lotta claim—above that line or this side of that line, that is up or down the creek with respect to that line?

A. They were working on the line and they were working above and below—both—right along.

Q. Afterwards you went down there and told these men that were under Mr. Kenzie and Mr. Burch that you were going to keep up work—what did the boys working for you do and what did those working under Mr. Kenzie's management do?

Same objection. Objection overruled. Defendant allowed an exception.

A. Well, they went away.

Q. Who went away? A. Mr. Kenzie's crew.

(Testimony of Al Black.)

Q. And what did Middleton and Seitz and the rest of the boys with you continue to do?

A. They kept on working around there. [395]

Q. Now, then, for the next few days what work were you doing up there under Mackey?

Same objection. Objection overruled. Defendant allowed an exception.

A. I was looking out for the work there—I was over on the flume and down there looking out for things right along.

Q. Were you acting in some capacity as a superintendent of any work there during that time?

A. Yes, I was working as a boss.

Q. When you say you were working on the flume, what flume do you have reference to?

A. That is the high line flume.

Q. The high line flume of the Ebner people?

A. Yes, sir.

Q. Did you notice any of the people under Kenzie up there either on the Lotta or on the Parish #2 lode claims?

Same objection. Objection overruled. Defendant allowed an exception.

A. Well, they were there on the 26th and we ordered them off.

Q. You have been talking about the 26th—you ordered them off on the 26th? A. Yes.

Q. What other time?

A. I don't know whether they came back the next day—they didn't come back the next and the next day I think it was they came back again.

(Testimony of Al Black.)

Q. On the 28th?

A. And we ordered them off and got them off again—I ain't sure whether it was the next day or the day after.

Q. Was there any other time that they tried to make an entry again? [396]

Same objection. Objection overruled. Defendant allowed an exception.

A. Well, they came in there on the first of October.

Q. On the first of October?

A. On the first of October.

Q. What did you do then?

A. We ordered them off again.

Q. Was that Mr. Kenzie, Burch or Kennedy?

A. That was Kennedy and those Finlanders, I think it was.

Mr. SHACKLEFORD.—We object to that.

Objection overruled. Defendant excepts. Exception allowed.

Q. You know where the upper tunnel was commenced during that year on the Parish #2 claim, don't you?

Same objection. Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. Do you know where the lower tunnel of the Parish #2 is? A. I do.

Q. That is the lower tunnel which is down near the flume that was afterwards built by the Kenzie people. Now, where with respect to these two last mentioned tunnels, was it that Mr. Kennedy and

(Testimony of Al Black.)

some of the defendant's people came there on the first of October?

Same objection. Objection overruled. Defendant allowed an exception.

A. It was between the two tunnels.

Q. Were you there yourself then?

A. Yes, I was.

Q. Who else was there of these people that were working for you?

A. There was Al Graham and Billy Moore and Adolph Myer, a man [397] named Reardon and a man named Gallagher.

Q. What were those people doing in and about these two tunnels you have just referred to and the Parish #2 lode claim?

Mr. SHACKLEFORD.—We object to any testimony along that line with reference to any work done on the property after the 27th day of July, 1910, for the reason that it appears from the pleadings in Case #803-A that the plaintiffs in this case have charged the defendants with entering upon the property prior to the 27th day of July, 1910, and remaining there continuously and wilfully and maliciously trespassing upon the property.

Objection overruled. Defendant allowed an exception.

A. McKenna and Graham were down on the lower tunnel and the others were clearing away where they started in the upper tunnel.

Q. How did you reach those tunnels and especially that upper tunnel on the Parish #2 lode claim from

(Testimony of Al Black.)

the boarding-house that these people were boarding at?

Same objection. Objection overruled. Defendant allowed an exception.

A. Most of them were boarding down town here, but they always went up to the works and then came down the old road on this side of the creek, they came down there part of the way and then they had a trail down; they had a rope then that led down into the creek, into the tunnel.

Q. Did you do any trail building that led from the upper part of the Ebner work, up from the boarding-house down to either one of these tunnels down on the Parish #2?

A. I didn't myself but I had some men there doing it.

Q. I mean your men? A. Yes, sir. [398]

Q. Who did you have working on that?

Same objection. Objection overruled. Defendant allowed an exception.

A. McKenna brushed out some and, I think, Graham did and Seitz.

Q. Billy Moore?

A. Billy did work a little but I don't think on that trail.

Q. Who, if anyone, was working in one of those tunnels on the Parish #2 when Kennedy came up or had you commenced the tunnel?

Same objection. Objection overruled. Defendant allowed an exception.

A. There was a tunnel—Al Graham and Mike

(Testimony of Al Black.)

McKenna were working in that tunnel.

Q. What conversation did you have with Kennedy, if any—Mr. Kennedy, who was assistant superintendent of the defendant company in this case?

Same objection. Objection overruled. Defendant allowed an exception.

A. Kennedy came up there to see me. He said, "Hullo, Al," and I said, "Hullo, Kennedy," and he said, "What are you doing here?" And I said, "I am going to work here," and he said that he wanted to have some understanding, he said, about blasting—he said, "When you blast here I want you to come down and tell my men how many shots you are going to fire, and then when you are through blasting come down and tell them it is all over or holler, 'All through,' " and I said, "I will do no such thing," and he said he would have me arrested, and I said, "You can't have me arrested; go and get the marshal." And then I told the men to go to work, and he went down below and he came back, and they brought a rock out and had it ready to roll down the hill, and I told the men to [399] holler, "Look out below," and Kennedy came running back and he said, "What did you holler 'fire' for and did not fire," and I said, "We didn't holler 'fire,' " and he said, "Yes, you did," and I said, "You are a liar." I said I hollered, "Look out below."

Q. Did the people under you continue their work?

Same objection. Objection overruled. Defendant allowed an exception.

A. Yes, sir.

(Testimony of Al Black.)

Q. What became of the people that were under Mr. Kennedy?

Same objection. Objection overruled. Defendant allowed an exception.

A. Well, they were working there and he went down and ordered them off. And he went back to where they had a tunnel and went to work down there.

Q. That is, down the creek? A. Yes, sir.

Q. (By the COURT.) On the Parish?

A. Yes, he went down at their tunnel which is on the Parish claim.

Q. (By the COURT.) Parish #2?

A. Yes, sir.

Q. Where is that tunnel with reference to the tunnel which they have commenced on the Colorado claim where the air-compressor is—is it above that or below it? A. It is above that.

Q. What, if anything, took place up there on the third of October?

Same objection. Objection overruled. Defendant allowed an exception.

A. Kenzie came up there with a crew of men and tried to put a [400] dam in, and we run them off or tried to run them off, but they came down here and had the marshal come up and he run us off.

Q. Did the marshal come up there to arrest any of your people?

A. He arrested me and two other fellows.

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

(Testimony of Al Black.)

Objection overruled. Defendant allowed an exception.

Q. When Mr. Kenzie and his people went up there on the third of October, where did his people begin work with respect to where they ultimately built this dam of theirs?

Same objection. Objection overruled. Defendant allowed an exception.

A. They were working right there at the dam.

Q. What, if anything, did the Kenzie people do when they had your people arrested and brought down to Juneau and while you people were in the custody of the marshal?

Same objection. Objection overruled. Defendant allowed an exception.

A. They went up there that night and tried to put their dam in there and did put it in. I didn't see the dam, but the boys told me they had put it in the night before—I didn't see it. I was arrested on the night of the third and some one told me they had put it in.

Mr. SHACKLEFORD.—We move to strike that part of the answer.

By the COURT.—It will be stricken.

Q. Did you go back on the property on the fourth?

A. No.

Q. You didn't go back to work on the 4th?

A. No, I was down here in the courthouse on the 4th. [401]

Q. When did you go on the property after that preliminary trial was had down here before Grover Winn—when did you go back on the property?

(Testimony of Al Black.)

Same objection. Objection overruled. Defendant allowed an exception.

Q. Approximately—whether it was two or three or four or five or six days?

A. It was right after the trial. I think the trial took two or three days.

Q. After you went back up there did you see anything that the Kenzie people had been doing or what they had done with respect to endeavoring to put in the dam?

Same objection. Objection overruled. Defendant allowed an exception.

A. Yes; I saw where they put some rocks down and had a box there.

Q. Do you know a fellow up there by the name of Harry that was in the employ of Kenzie's people,—O. M. Harry? A. I do.

Q. I will ask you if the Kenzie people, while you people were under arrest at that time, placed anybody on any portion and took possession of any portion of this high line flume line which you had been clearing out?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial, and for the further reason that, as previously stated, they are estopped from claiming an entry at the date mentioned, for the reason of their prior allegation in 803, and he refers to work approximately at least half a mile from the property in dispute.

Objection overruled. Defendant allowed an exception. [402]

(Testimony of Al Black.)

A. Well, Harry went up there and put his tent up there on the third, the day we were arrested.

Mr. SHACKLEFORD.—We object to that—it has nothing whatever to do with the controversy in this case.

By the COURT.—You may cross-examine to show that at this time. There is nothing yet before the court to show where it is exactly.

Judge WINN.—I will admit, without any further examination, that this is on another piece of property belonging to the same company.

By the COURT.—Although these acts may constitute a series of acts explaining the others, I don't at present see the materiality of showing the fight for the possession of water on the other locations than the Lotta and Parish #2.

Judge WINN.—I was offering it for the purpose of showing the intent with which these people went on there.

By the COURT.—This interference with your diversion of water—I think you had better stick as closely as possible to the ground in controversy.

Mr. SHACKLEFORD.—I move to strike the testimony of the witness heretofore given with reference to that particular entry.

By the COURT.—You refer to the O. M. Harry episode?

Mr. SHACKLEFORD.—Yes, sir.

By the COURT.—It will be stricken.

To which ruling of the Court counsel for plaintiff excepts. Exception allowed.

(Testimony of Al Black.)

Q. Now, during this time and up to the third of October, at the time that you and Mackey and the rest of them were arrested, [403] about how many men had been up there, to work there under you or under you and Mr. Mackey both, in and upon this Ebner property?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial, and on the same grounds as previously stated that the parties to this case are committed to the date.

Objection overruled. Defendant allowed an exception.

A. Well, there was Graham and McKenna and Middleton and Seitz and Carlson, five men, and Hunsucker was down there off and on.

Q. You had approximately how many men that were working up there?

A. There was five—I think there was about five men right there, all along, after the 26th.

Q. That don't, of course, have any reference to the work that Hill and Wettrick were doing up there surveying? A. No; they were surveying.

Q. Now, after you went back up on this property, after this arrest and trial down here before Grover Winn, the result of which was that you people were bound over to appear before the grand jury, wasn't it—

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial.

Judge WINN.—I want to show that after they were bound over they went back up there and I want

(Testimony of Al Black.)

to show their acts afterwards.

By the COURT.—Get to the proposition directly.

Q. After your trial was over before Grover Winn or preliminary hearing, rather, had, did you then go back on this Eb— [404]

Same objection. Objection overruled and defendant allowed an exception.

A. I did.

Q. When you went back up there, what work, if any, were you engaged in for some little time after that?

Mr. SHACKLEFORD.—Same objection.

Objection overruled. Defendant allowed an exception.

A. Well, I was working on the flume grade.

Q. The high line flume? A. Yes.

Q. Who, if anyone, was doing any work either over on the Lotta or on the Parish Number 2 lode claim?

Same objection. Objection overruled. Defendant allowed an exception.

A. There was Reardon was there and Graham and McKenna and Middleton and Seitz and Carlson—I don't know whether Carlson was there or not; Seitz was there.

Q. You stated a while ago—when you started out and I asked you about what had been done up there on this property, you said something about some fences being built. I will ask you what fences were built up there that you had reference to.

(Testimony of Al Black.)

Mr. SHACKLEFORD.—What property are you referring to?

Judge WINN.—We will get down to it and see. I meant the fence down on the Lotta or Parish Number 2.

A. There was a fence built across the road there, where the road comes down to the compressor. Hunsucker put up a fence there.

Mr. SHACKLEFORD.—We object to that and move to strike as incompetent, irrelevant and immaterial. [405]

Mr. SHACKLEFORD.—And long after the date of entry.

The WITNESS.—This was before the 26th of September that he built the fence there.

Same objection. Objection overruled. Defendant allowed an exception.

Q. The exact date he built the fence there you don't know? A. I ain't sure about the date.

Q. That fence, as I understand, was built on what road? Describe that.

A. There is a road leading from the Basin road down a little by road, going down to the compressor building—it goes down part of the way and then there is a chute.

Q. The compressor building of the Ebner Gold Mining Co.? A. Yes, sir.

Q. That road is on which one of these claims, the Lotta or the Parish #2?

Same objection. Objection overruled. Defendant allowed an exception.

(Testimony of Al Black.)

A. On the Parish #2.

Q. Did you ever see any notice posted—I don't mean to ask you what the notice contained, but did you ever see any paper writing posted about where this fence was built across the road that you spoke of?

Same objection. Objection overruled. Defendant allowed an exception.

A. Yes, Hunsucker had a notice there—a notice there for trespassers to keep out.

Q. Now, I will ask you before any of Kenzie's people came up where you say they were on the third day of October, whether any of the people that were working under you were on the Lotta or the Parish #2 lode claim doing any work? [406]

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial, and not within the time laid for entry, and on the further ground that the witness has not shown that he has any personal knowledge of this matter.

Objection overruled. Defendant allowed an exception.

A. Yes, they started in to work on that—if I remember right, it was the 17th or the 18th or the 19th of September.

Q. They started in to work on the Lotta and the Parish #2? A. On the Parish #2.

Q. Do you remember who those men were that started in to work on the Parish #2 about the 18th or 19th of September?

Same objection. Objection overruled. Defendant

(Testimony of Al Black.)

ant allowed an exception.

A. The first day Hunsaker and Mike McKenna went down and the next day Graham went down.

Q. And what work were they doing upon this claim in a general way up to the third of October?

Same objection. Objection overruled. Defendant allowed an exception.

A. Well, Graham and McKenna were working in that lower tunnel.

Q. On the Parish #2?

Same objection. Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. Now, on the third day of October, you haven't made it plain whether or not any of the people working under you or with you were on either the Lotta or the Parish #2 before any of Kenzie's people came up there and undertook to put in a dam?

Same objection. Objection overruled. Defendant allowed an exception. [407]

A. There were two men—there were four men; there were two in the Lotta tunnel and two above.

Judge WINN.—That is all.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. When was it you went up on this property?

A. On the 11th of August.

Q. Was that before this dispute arose between the parties or after?

A. I don't know nothing about that.

Q. You don't know anything about any dispute?

(Testimony of Al Black.)

A. I know the dispute that we had afterwards, the dispute we had up there—that was afterwards.

Q. You knew, didn't you, that about the 25th of August Mr. Mackey's company started a suit in the name of the Ebner Company against the Alaska-Juneau for trying to build a water right?

A. Yes, I knew about that.

Q. That was shortly after you came up there?

A. Yes, sir.

Q. And while you were still on the upper end of the property, on this work here? A. Yes, sir.

Q. When did you go down on the Lotta and Parish claims? A. About the 18th of September.

Q. You don't want the Court to understand that up to that time you had no knowledge of the fact that the Alaska-Juneau people were working on a flume-line along Gold Creek from the Lotta claim on out toward the Colorado?

Judge WINN.—From the Lotta down?

Mr. SHACKLEFORD.—Yes. [408]

A. They were not working there then.

Q. They had not done any work?

A. Not then.

Q. They hadn't made any entry on the property?

A. They were down at Snowslide Gulch.

Q. You knew where the flume-line was going to be?

A. I did not, not at the time. I didn't know what they were going to do.

Q. Hadn't the slightest idea?

A. I seen a water notice there.

(Testimony of Al Black.)

Q. You saw a water notice there, and you knew that was the place where the intake was going to be?

A. Yes.

Q. And you were sent down for the purpose of blasting, to keep these people off of there, in their construction work, were you not?

A. We were there to keep them off, yes, sir.

Q. That is the reason that you and your crew went onto the Parish claim?

A. No; there were men working in the tunnel before any of the Treadwell people came there.

Q. You are speaking now of the entry made by Kenzie and Burch that you started out on your direct examination to speak about,—you are referring to that date, are you?

A. I am referring to when they went there—on the 18th, I think it was, the 18th of September, they went to work in that tunnel.

Q. And that is what they were sent there for?

A. No; they were sent to work then in the tunnel—they went down there to drive that tunnel in. [409]

Q. You were sent there for the purpose of keeping the other people off the ground?

A. Yes, when I went there.

Q. And so far as the time when these other men that went there ahead of you are concerned, you are making a statement to the Court about that—you didn't go there with these other men and don't know what their instructions were except by—

A. Which other men?

(Testimony of Al Black.)

Q. The men you say were there ahead of you.

A. I knew what the men were doing in the tunnel, yes.

Q. By conversation with them? A. Yes.

Q. Not by reason of any instructions yourself?

A. Yes, sir.

Q. I want you to understand this, that you are here for the purpose of telling what you saw and heard on the ground, not what you saw and heard from your confederates up there. Confine yourself to what you know and not what you have been told. Now, Mr. Black, you were sent there by instructions from Mr. Burton to blast on those people whenever they came there to work? A. I was not.

Q. You had instructions—you were advised by counsel to do that? A. I was not.

Q. Didn't you so state in your examination at the preliminary hearing?

A. I was not to blast on them people. I was to try to keep them away from there, but I had orders to try not to hurt anybody.

Q. But you were to blast so as to scare them,—is that the idea? [410] A. Yes, sir.

Q. And you are the same Al Black who was afterwards convicted in the case of the United States vs. Macky and others for that blasting?

A. The same one.

Q. And that was the reason that you went on the ground,—is that right? A. Yes.

Q. And you knew at that time a water location notice had been made and you knew that they were

(Testimony of Al Black.)

going to construct a flume way down the creek, didn't you,—is that right? A. Yes, sir.

Q. I wish you would come here to this map and show me where this fence was that Hunsucker built, assuming that his point near the place marked "chute" is the road leading to the compressor—this is the road where it branches off, I suppose?

A. This fence was built across the road, right there.

Q. Right at the place where the road leading to the chute leaves the Basin road proper?

A. Yes, sir.

(By Judge WINN.)

Q. Mr. Shackelford asked you something about seeing a water notice that you thought was put up by some people under Mr. Kenzie. I will ask you where was that water notice posted on Gold Creek in reference to where the present dam is that has since been constructed by these defendants?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial. [411]

Objection overruled. Defendant allowed an exception.

A. I think we measured it—it was 130 feet from the compressor, the Ebner compressor building down the creek.

Q. About how far up the creek from where the present dam of the Treadwell people is, do you know?

Same objection. Objection overruled. Defendant allowed an exception.

(Testimony of Al Black.)

Judge WINN.—I mean the Alaska-Juneau Company.

A. It is quite a ways down—it is further down, a couple of hundred feet, maybe more—I couldn't say exactly.

Q. The dam is a couple of hundred feet down from where this first notice was put up?

A. Yes, sir.

Q. Now, he asked you about being advised by counsel in this matter—you were advised by counsel that you had a right to hold possession of the patented property up there so long as you didn't resort to any too much force to keep people off, were you not? A. Yes, sir.

Mr. SHACKLEFORD.—We move to strike the answer and object to the question as leading.

By the COURT.—It is answered. Objection overruled. Defendant allowed an exception.

Q. The same efforts you were making there at these dates you have referred to on the 22d and 23d, the efforts you were individually making, were for the purpose of keeping them off that property?

A. It was.

Q. These other people that were working there, Mr. Seitz and Billy More and Al Graham, you say that they were [412] working on the tunnel on the Parish #2, I believe? A. Yes.

Q. Now, then, that tunnel was finally run into what depth there, do you remember?

A. I guess the lower tunnel was in there about 30 or 35 feet when they started to work.

(Testimony of Al Black.)

Q. And then the upper tunnel—these people that you refer to as working under you, commenced that upper tunnel altogether? A. Yes, sir.

Q. Do you know—have you been up there, and do you know as to what extent they did run that upper tunnel into the Lotta claim?

A. I was not there.

Q. You don't know? A. No, I don't know.

Q. How much longer do you have personal knowledge of work having been done on that tunnel, on the Parish #2 claim, known as the upper tunnel—how much longer did our people continue to work on there in the summer of 1910?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. They were working there until along in November some time. I was not there then. I went down to Ketchikan, and they worked afterwards, after I came back, but I don't know how long.

(By Mr. SHACKLEFORD.)

Q. Whom were you employed by?

A. By Mr. Bent and Mr. Mackey. [413]

Q. What company?

A. The California & Nevada Copper Company, I believe it was.

Q. And under this advice of counsel to scare these people off you blasted from the hillside, above where they were working and the debris rolled down in the vicinity of where they were working?

(Testimony of Al Black.)

A. Yes.

Q. You were working for the California & Nevada Company all the time you have been testifying about?

Judge WINN.—We object as not the best evidence.

Objection overruled. Plaintiff allowed an exception.

A. Well, yes; we called it the Ebner Company.

Q. Whom were you hired by and paid by?

A. Mr. Mackey.

Q. He issued you pay checks? A. Yes, sir.

Q. What did they represent—was the name of the Ebner Company on there? A. No.

(By Judge WINN.)

Q. How were you paid off, with checks or money?

A. Checks.

Q. Give by Mr. Mackey?

A. Yes, sir; Mr. Mackey signed the checks.

Q. All you know about it was what you saw on the checks, and the people Mackey was working for—they were signed and made out in the way you say? A. Yes, sir.

Witness excused. [414]

**[Testimony of Lloyd G. Hill, for Plaintiff
(Recalled).]**

LLOYD G. HILL recalled as a witness in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. I believe I asked you something concerning

(Testimony of Lloyd G. Hill.)

your having in the year of 1910 made a survey of some flume-line of the Ebner Company. I will ask you if you know where the high-line flume of the Ebner Company is, as it has been constructed?

A. I do; yes, sir.

Q. Did you have anything to do with the surveying or the laying out of the right of way for that high-line flume?

A. I surveyed the grade for it; yes, sir.

Q. When did you commence work, if you remember, upon making a survey of the right of way for this high-line flume?

Mr. HELLENTHAL.—We object as immaterial.

Objection overruled. Defendant allowed an exception.

A. I think it was the second or third day of August I started in on the preliminary work.

Q. Have you any record in your office by which you could testify—by which you could be positive of those dates?

A. I think my note-book will show; yes, sir.

Q. Do you know at this time whether it was the second or third?

A. It was either one of those two dates.

Q. Of August, 1910? A. Of August, 1910.

Q. You know, Mr. Hill, where the tunnel is that is being driven by Mr. Mackey, commencing this side of Cape Horn? A. I do, yes, sir.

Q. I believe it commenced on one of those Cape Horn claims—which one, do you remember?

A. On the Cape Horn #2 claim. [415]

(Testimony of Lloyd G. Hill.)

Q. You know where that tunnel is?

A. Yes, sir.

Q. What, if anything, did you have to do with the laying out and surveying of that tunnel?

Mr. SHACKLEFORD.—We object to any testimony with reference to surveying or reconnaissance work—it is evidently put in there for the purpose of strengthening their assessment work.

Judge WINN.—It is not put in for assessment work.

Objection overruled. Defendant allowed an exception.

A. Yes, I surveyed that also.

Q. When did you commence that? Would you say that followed along very soon after?

A. Well, it was taken up while the survey of the flume was being made?

Q. You know Al Black, the witness who has just testified? A. I do.

Q. Do you remember when Al Black first went to work up there in the summer of 1910?

A. Sometime in August. I wouldn't be certain—about the middle of August—I wouldn't be certain about the date.

Q. Do you know where he commenced work?

A. Back at that time commenced work on the grading out, laying out, the grade of the flume-line, the high-line flume, which I had surveyed.

Q. Where on that grade did he commence work?

A. He commenced work at the Ebner dam—that would be on the Golden Fleece claim, on the north

(Testimony of Lloyd G. Hill.)

side of the creek.

Q. Approximately how long a time were you engaged in laying out this flume-line and surveying on this tunnel? [416]

A. Well, that and in connection with the other work we were doing, we were engaged practically all of August and September and October, with slight intermissions.

Q. What was Mr. Mackey and his people doing up there during this time, generally?

A. They were excavating for the mill grade on the Cape Horn #2—they were cutting out the grade.

Mr. HELLENTHAL.—We object to that as immaterial.

Objection overruled. Defendant allowed an exception.

WITNESS.—(Continuing.) They were cutting out the grade for the high-line flume; they were constructing a high-line flume—they were driving tunnels on the Parish #2; they had two places they were doing excavation work on the surface and doing all those things that are necessary to start a mine and put it in working condition.

Q. I will ask you if you know what length of tunnel was driven down on the Parish #2 in 1910?

Mr. SHACKLEFORD.—We object to any testimony with reference to work done on the Parish #2 in 1910 until it is made apparent that the work was done prior to the location of the claim in question and prior to the location of the water right.

(Testimony of Lloyd G. Hill.)

Objection overruled. Defendant allowed an exception.

A. I should think approximately 18 feet.

Q. Do you mean 18 feet— A. In both tunnels.

Q. In the upper and the lower tunnel?

A. Yes, sir.

Q. (By the COURT.) Do you mean 18 feet in each tunnel or both tunnels? [417]

A. That would mean 18 feet in both tunnels.

Q. Did you aid Mr. Wettrick afterwards in making a survey of the Parish #2 for patent during that year? A. I did, yes, sir.

Mr. SHACKLEFORD.—I move to strike the last answer of the witness as incompetent, irrelevant and immaterial and not within any of the issues in the case.

Motion denied. Defendant allowed an exception.

Judge WINN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Whom did you go to work under when you started to run that survey of the high line flume,—that is after Mr. Tripp had severed his connection with the California & Nevada Company, wasn't it?

A. No, the first time I went up there, Tripp was along, I think, with Bent, Mackey and I and several others.

Q. Who hired you? A. Why, Mr. George Bent.

Q. George Bent was superintendent of the California & Nevada Company when he hired you?

A. I didn't know at that time a thing about who

(Testimony of Lloyd G. Hill.)

he represented or anything about it.

Q. You know, however—you have learned since—that he was acting as superintendent of the California & Nevada Company?

Judge WINN.—I object to that as incompetent, irrelevant and immaterial. It appears clearly in this case if the California & Nevada Copper Company or any other company in the world did anything on there, they were stockholders in the Ebner Gold Mining Company. [418]

Objection overruled. Plaintiff allowed an exception.

Q. You learned afterwards that Mr. Bent was the superintendent of the California & Nevada Mining Company and was hiring you as such when you went to work there—is that not true?

A. No; to this day I don't know who Mr. Bent really represents.

Q. You don't know really who he represents?

A. No.

Q. Have you rendered him any bills?

A. Yes, sir, I have.

Q. How have you made those bills out?

A. I have drawn those bills to the California & Nevada Copper Company.

Q. Did you receive any pay? A. I did.

Q. How were you paid?

A. I was paid by the California & Nevada Copper Company.

Q. You were paid by the California & Nevada Copper Company? A. Yes, sir.

(Testimony of Lloyd G. Hill.)

Q. By their check, signed with their name?

A. Yes, sir.

Judge WINN.—It is understood that our objection goes to all of this testimony and we are allowed an exception?

By the COURT.—It is so understood.

Q. All this work that you have testified to, all this surveying, and all these other things you have done here that you have been testifying about, are all included within the bills that you have rendered to the California & Nevada Company, for which the California & Nevada Company paid you? A. Yes, sir.

Q. You know that Mr. Bent is superintendent of the California & Nevada Company, don't you?

[419]

A. No, sir; I knew that he and Ebner were very close together, and I always thought he was looking after Ebner's interests. In other words, I didn't know what connection Bent and Ebner and the California & Nevada Copper Company really had.

Q. You don't know that?

A. No, I do not, positively.

Q. Anyhow Bent, whoever he was, hired you to do this work? A. Yes, sir.

Q. And you rendered your bills to the California & Nevada Mining Company and were paid by that company? A. I did.

Q. That includes all the work to which you have testified?

A. That includes all the work to which I have testified.

(Testimony of Lloyd G. Hill.)

Q. And Tripp didn't hire you to do the work?

A. No, Tripp didn't hire me.

Q. The employment next after Mr. Tripp ceased to be superintendent and Bent had taken his place,—how about that?

A. I didn't know about that; they were all here together and I didn't know when Tripp severed his connection with the company. They were all together, but Bent made the arrangements for my work.

Q. It was about the 2d and 3d of August?

A. The arrangements were made on the first of August, I think—I think I went up on the first of August and surveyed a millsite—looked over the ground for a millsite.

Q. That was done on the first of August?

A. Yes, sir.

Q. And the surveying you did on the first of August was a millsite lower down the creek?

A. Yes. [420]

Q. And later on, about the second or third, Mr. Bent in the presence of Mr. Tripp made an arrangement with you to survey the tunnel line?

A. No, sir; that arrangement was made in the Occidental Hotel, alone, between Bent and I.

Q. Tripp was not there? A. No.

Q. That was after you had done the surveying on the millsite? A. Yes sir.

Q. Who was present in the Occidental Hotel when the arrangement was made?

A. That was made between Bent and I—I don't

(Testimony of Lloyd G. Hill.)

think there was anybody present.

Q. When you made the arrangement for the survey of the millsite was Tripp and Bent both there?

A. No, sir.

Q. That was made with Tripp?

A. No, I didn't know Mr. Tripp in connection with any of the surveys at all.

Q. The only man you dealt with was Bent?

A. The only man I dealt with was Bent and subsequently Mackey, after Bent left.

Q. Now, I want to ask you a question that is not probably cross-examination, as far as this particular examination is concerned, but I ask leave of the Court to ask this one question with reference to this matter. The road leading from the public road to the compressor-house is delineated on this map?

A. Which road do you refer to?

Q. The road leading from the Basin road to the compressor-house. [421] A. Yes, I think it is.

Q. Where is that?

A. The road on the Parish #2, leading from the Basin road down to the point marked "chute."

Q. Now, along about the middle of August you commenced surveying—on about the third of August you saw and surveyed that flume-line?

A. Yes; I commenced on the second or third.

Q. And after you had surveyed the flume-line along about the middle of August, Mr. Black commenced to brush out the line along the line you had previously surveyed?

A. I don't know just when Black went up, but

(Testimony of Lloyd G. Hill.)

whenever he did, he started at that time to cut off the brush, blast out the rock and make a foundation for the bottom of the flume.

Q. He commenced the actual work of constructing a grade for the flume; is that right?

A. Yes, sir.

Q. Whenever that was—along the middle of August, you wouldn't say the exact date?

A. Yes, sir.

Q. Commenced at the upper end, near the Crown Point? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

Witness excused. [422]

[Testimony of Angus Mackey, for Plaintiff.]

ANGUS MACKEY, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your business, trade or profession?

A. Constructing engineer.

Q. How long have you been engaged in that business, approximately?

A. Over thirty years, or forty years, perhaps.

Q. How long have you been engaged in that business in Alaska?

A. Off and on since 1893—I have been off to other different countries since then.

Q. What work in that line generally have you done in Alaska, in what companies?

A. The Alaska Treadwell, the Alaska Mexican and

(Testimony of Angus Mackey.)

the Alaska United.

Q. When did you come to Alaska, that is, approximately—what time did you come here, in 1910?

A. I came up here first in August.

Q. By whom were you sent here?

A. By F. L. Underwood, of New York.

Q. Did you know at that time whether or not he had an option on the stock of the Ebner Gold Mining Company?

A. That part I don't know anything about at all.

Q. When you came here in 1910, who of the parties that were interested with you in the undertaking which you were about to commence on this Ebner property were here in Juneau?

A. There were several gentlemen from the east,—Mr. O'Boyle, Briggs and Professor Enright and George E. Bent.

Q. You knew at that time generally about this Ebner property up the Basin here, did you not?
[423] A. I did.

Q. You had been in Alaska also for some years working for the Treadwell Company and building mills over there and I will ask you if you had prior to 1910 been upon the Ebner property? A. I had.

Q. What work generally did you commence doing on this property in 1910 when you came here?

A. Well, first I started on the flume and built a flume from the Ebner dam to bring water down to the mill we were going to build in Shady Bend.

Q. That is the same flume that you heard Mr. Hill speak of a while ago on the witness-stand, is it?

(Testimony of Angus Mackey.)

A. It is.

Q. In 1910, approximately what work did you do in the way of the construction of that high line flume over this grade that Hill testified he had surveyed out, I mean approximately?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. We built the flume about four thousand feet in length.

Q. About how many feet?

A. About four thousand.

Q. In 1910? A. Yes, sir.

Q. Did you have it built that far up in the latter part of December last year?

A. Yes, nearly completed.

Q. What are the dimensions of that flume?

A. It is four feet wide and three feet high.

Q. Do you remember approximately how much it cost to build it? [424]

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. About \$9,000, approximately.

Q. Approximately \$9,000? A. Yes.

Q. Now, you know, Mr. Mackey, what has been pointed out to you to be the Parish #2 lode claim up there, do you not? A. I do.

Q. I will ask you what work, if any, during 1910,

(Testimony of Angus Mackey.)

you had done on the Parish #2 lode claim—just give me the approximate amount of work.

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial, no proper foundation having been laid, and on the further ground that under the assessment act statute the Parish became forfeited upon the failure to perform the work in 1909.

Objection overruled. Defendant allowed an exception.

A. We did work on two tunnels, considerable work, on the Parish #2, sufficient to get a patent and it was surveyed for patent, an official survey was made.

Q. What, if anything, in 1910 did you do on what is referred to on this exhibit “N” as the Ebner mine tunnel?

Same objection. Objection overruled. Defendant allowed an exception.

A. We faced up for a new tunnel there and got the tunnel started.

Q. Approximately, how much did you spend on that tunnel in the year 1910?

A. \$590, approximately. [425]

Q. Do you remember the date that Mr. Tripp turned over these premises up there, the day he quit and you commenced?

A. No, I don't remember the exact date. It was when those parties were out from New York.

Q. You heard Mr. Black testify in this case?

A. Yes, sir.

Q. Did you employ him to go up there, you and Mr.

(Testimony of Angus Mackey.)

Bent? A. Yes, sir.

Q. Do you know anything about Mr. Hill having made any survey for a flume-line or for a tunnel right during that season?

A. I do. Mr. Bent informed me that he engaged—
Objected to. Objection sustained.

Q. Did you see Mr. Hill at work up there?

A. I did.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

Q. Who was working with Mr. Hill?

Same objection. Objection overruled. Defendant allowed an exception.

A. I believe Mr. Wettrick, his partner.

Q. Now, from the time you commenced there—did you say approximately what time you commenced,—was it July or August? A. In August.

Q. Had you taken charge of affairs up there at the time that Al Black went to work?

A. Well, yes; at that time I would state I was in Seattle, getting out the framework for the 200-stamp mill.

Q. What was done with reference to building a mill up there, generally, in the year 1910? [426]

Objected to as immaterial. Objection overruled. Defendant allowed an exception.

A. I got out the frame work for the 200-stamp mill and about three-quarters of the grade was finished for the mill.

(Testimony of Angus Mackey.)

Q. About three-quarters of the grade for the mill?

A. Yes, sir.

Q. On the millsite? A. Yes, sir.

Q. Did you have any machinery shipped up here looking toward the erection of this 200-stamp mill?

A. We had.

Q. In a general way, what machinery did you have shipped?

A. There was the foundation building and some mortars here and some other machinery, I believe, is at Seattle—it stopped there because we couldn't get it forward far enough last fall.

Q. Do you know approximately how much money was paid out in the year 1910 on the timbers, etc., for this mill?

Same objection. Objection overruled. Defendant allowed an exception.

Q. Leaving out the question of the machinery?

A. Approximately at this end \$35,000.

Q. How much about on the machinery or does that include the machinery?

Same objection. Objection overruled. Defendant allowed an exception.

A. No, that didn't include the machinery; probably \$20,000 paid out,—approximately \$20,000 for that.

Mr. HELLENTHAL.—I should like to know if this witness is testifying from his own knowledge.

Q. I asked you how much you know about, how much you know of, [427] was paid out. You said at this end of the line approximately \$35,000—do you

(Testimony of Angus Mackey.)

know? A. Yes, I know.

Q. Now, did you say how much on the mill? You gave that separately?

A. One-fifth of the purchase price; as a general rule, it is $\frac{1}{3}$ or $\frac{1}{5}$ has to go with the purchase price of the machinery, always.

Q. You gave the separate amounts there, as I understand it—one amount was paid out on the mill and timbers and the other amount was paid on the machinery?

A. On the machinery, yes, in New York.

Q. You segregated it? A. Yes, sir.

Q. What was this flume that you constructed, constructed for?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. It was built to furnish water for power for the 200-stamp mill and compressor plant or any other machinery we would be liable to use in connection with the mining and milling.

Q. As I understand, then, the flume was built for the purpose of conveying water to generate power to open up, develop and mine this property?

A. It was—the Ebner property.

Q. This exhibit “N”—have you looked at it, Plaintiff’s Exhibit “N”? A. Yes.

Q. The mill that you speak of is indicated on this by the following words, “Proposed 200-stamp mill.” Is that the mill you [428] have reference to?

(Testimony of Angus Mackey.)

A. Yes, sir.

Q. What tunnel is that you say you did work on during the year 1910?

A. That is the main tunnel. It is to be the main working tunnel to strike the ore body under the present workings of the Ebner mine.

Q. It is the tunnel represented on this exhibit "N" as the Ebner mine tunnel?

A. Yes, sir; that is the new tunnel of the Ebner mine.

Q. You are still at work on that tunnel?

A. Still at work on it; yes.

Q. Approximately how far has it been driven in? Same objection. Objection overruled. Defendant allowed an exception.

A. Approximately 450 feet.

Q. To what extent do you expect to drive that tunnel?

Same objection. Objection overruled. Defendant allowed an exception.

A. I think the surveyor made it about 2,800 feet that we would have to drive.

Q. How is this mill that you propose to build and as indicated on this exhibit "N"—this proposed 200-stamp mill—how is it being built with respect to altitude? Is it at a lower or higher point than the Parish, Lotta and Taku and those other mining claims up there?

Objected to as incompetent, irrelevant and immaterial.

(Testimony of Angus Mackey.)

Objection overruled. Defendant allowed an exception.

A. It is lower.

Q. Is this millsite that I have just spoken to you about the site you testified concerning, having been graded by you? [429]

Same objection. Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. About how much money did you expend on the grading of that millsite in the year 1910?

Same objection. Objection overruled. Defendant allowed an exception.

A. Approximately \$4,800 on the mill grade.

Q. Now, Mr. Mackey, do you know anything about the advent of the defendant company's people upon any of this property in 1910, about their going upon any of it? A. How is that?

Q. Do you know anything about any of the people representing the defendant company, the Alaska-Juneau Gold Mining Company, making an effort or getting on to any of this property during the summer of 1910? A. I do.

Q. You know Mr. Kenzie? A. I do.

Q. You have known him for several years, have you not? A. Yes.

Q. Did you have any conversation with Mr. Kenzie, as representing the defendant company in this case, about their going upon the Parish Number 2 lode claim and the Lotta claim during that year?

A. I did.

(Testimony of Angus Mackey.)

Q. About what time and where did that conversation take place?

A. About the latter end of September, on the Basin road.

Q. The latter part of September, upon the road that leads from here up to the mine? A. Yes, sir.

[430]

Q. What was that conversation?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial and not proper evidence. If it is introduced for the purpose of showing entry at that time, not conforming to the admissions in 803-A.

Objection overruled. Defendant allowed an exception.

Q. Go ahead, Mr. Mackey.

A. Mr. Kenzie met me and wanted to make an agreement to notify each other about the time we would blast, but I refused to do so, considering them jumpers on our property.

Mr. SHACKLEFORD.—We move to strike the last part of the answer as not responsive to the question.

Motion granted. Stricken.

Q. Now, just state the whole conversation—whether Mr. Kenzie caught up with you on the road or you caught up with him and what was the conversation about. Had there been any rupture between your people and his people before that time?

A. Not as I know. Well, I believe there was a suit brought here, but I wasn't here at the time the suit was brought.

(Testimony of Angus Mackey.)

Q. What did you and Mr. Kenzie talk about? Is that all you said—have you repeated the full conversation?

A. No, I refused to comply because I didn't consider—for the reason that I didn't consider that I had any right to.

Q. Did you tell him that?

A. I told him that I understood he was a bluffer and was bluffing the whole country, but couldn't bluff me, not for a little minute.

Q. I want the whole conversation you had with him—now, when you had that conversation you were talking about work that your people were doing on what claims? [431]

A. On the Parish and Lotta.

Q. On the Parish #2?

A. On the Parish #2.

Q. And the Lotta? A. Yes, sir.

Q. Was that all the conversation you had with Mr. Kenzie?

A. I told him, I think, that I didn't propose to hurt anybody, I didn't want to hurt anybody, and the only thing I would do was to notify them when we were going to blast, which we always did.

Q. Then, I understand, was it or was it not, that the agreement he wanted you to enter into was to allow his people to go ahead and work on these claims and you work too?

Objected to as leading. Objection sustained.

Q. What work was it that Mr. Kenzie was talking about that he wanted to do so that you could give him

(Testimony of Angus Mackey.)

notice of blasting, etc.?

Mr. SHACKLEFORD.—We object to the question as leading and argumentative and calling for a conclusion.

Objection overruled. Defendant allowed an exception.

Q. What work was it that Mr. Kenzie was trying to do at that time and what work were you doing that he wanted some compromise measure entered into about the time of blasting and firing?

A. He wanted to build a dam across the Lotta patented claim to divert the water.

Mr. SHACKLEFORD.—We move to strike the answer as stating a conclusion.

By the COURT.—The question was what they were doing and I take it the answer, although not direct, is an answer to that question. Objection overruled.

Defendant allowed an exception to the ruling.
[432]

Q. Up to this time that you had this conversation with Mr. Kenzie, had they done any work on the Lotta claim, had Mr. Kenzie's people done any work on the Lotta claim?

A. No, I don't think they had, except getting down some logs and so on, but I suppose it was to be used to throw a temporary dam across the creek.

Q. Were you present, Mr. Mackey, during any of this controversy that took place between the Ebner people and the Kenzie people on the third of October?

A. No, I was not.

(Testimony of Angus Mackey.)

Q. You were one of the parties that was arrested for something that took place up there that day?

A. I was.

Q. You and the other parties had a preliminary hearing down here before Grover Winn, United States Commissioner? A. Yes, sir.

Q. Do you remember approximately how many days you took up in that preliminary examination before the Commissioner?

Objected to as incompetent, irrelevant and immaterial.

Judge WINN.—It is preliminary.

Objection overruled. Defendant allowed an exception.

A. We were there two or three days, anyhow, I think, down here.

Q. Do you know anything of the people under Mr. Kenzie, what they did or what structures—what they put upon either the Lotta or the Parish #2 lode claim while you were,—while you people were down here under arrest and attending that preliminary hearing?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. As soon as we were arrested they started in to throw a dam [433] across there, that very night.

Mr. HELLENTHAL.—We move to strike that—he is not testifying to what he saw.

By the COURT.—It does not so show as yet—it

(Testimony of Angus Mackey.)

may be true. You may cross-examine.

(By Mr. HELLENTHAL.)

Q. You didn't see anybody construct that dam, did you? A. That night?

Q. Yes.

A. Well, hardly—I see that the work was done.

Q. Were you there when the work was done?

A. It surely didn't get built itself, surely.

Q. I ask you if you saw the work done.

A. I told you I did.

Q. You did see them do the work?

A. I said I saw the work had been done.

Q. You saw the work after it had been done?

A. That the work had been done; yes, sir.

Q. But you didn't see anybody do the work?

A. I think I answered the question.

Q. Did you see this work done?

By the COURT.—He said he did not.

Mr. HELLENTHAL.—Then I move to strike.

By the COURT.—The first answer will be stricken but the testimony of the witness regarding work of this kind being done during that night will stand.

Defendant allowed an exception to the ruling of the Court.

(By Judge WINN.)

Q. How long was it after you were brought down here by the marshal [434] before you got back on the property up there?

A. Oh, it was several days—I couldn't state exactly.

Q. When you got back, did you notice anything

(Testimony of Angus Mackey.)

that the people under Mr. Kenzie had been doing down there in relation to building that dam across the creek on the Lotta claim?

A. Yes; they had throwed some rocks across there and put up a temporary dam.

Q. Had a little piece of flume in?

A. Had a box in there.

Q. Do you remember Mr. Burch, the man who was up here somewhat looking after that work for the Alaska-Juneau Company? A. I do.

Q. Do you remember Mr. Burch having testified upon the witness-stand upon some of those hearings—he went upon the witness-stand, did he not?

A. Yes, sir.

Q. Do you remember his having testified that his people—meaning the Alaska-Juneau Gold Mining Company, the defendant in this case—that they did go down there that night and put in a part of that dam and got what he considered a diversion of the water? A. Yes.

Q. And that this was done while you people were under arrest—you heard Burch testify to that?

A. While, we were under arrest.

Mr. SHACKLEFORD.—I understand you to claim that these people were detained in jail all night.

Judge WINN.—They were in the custody of the marshal.

Q. You didn't go to jail?

A. I didn't go to jail. [435]

Q. Will you name the people that were arrested up there by a warrant sworn out by Mr. Kenzie—you

(Testimony of Angus Mackey.)

remember the number of people that were arrested?

Objected to as not the best evidence. Objection sustained.

Q. I will ask you this question, if it is not a fact that all the men that you had working over there on the Lotta and Parish #2, that the defendant company claimed were interfering with their work, if they did not have every man in sight arrested and brought down here?

Objected to as leading. Objection sustained.

Q. Who were arrested with you and brought down with you—can you give me the number of men and their names?

Objected to—

By the COURT.—The objection will be overruled—if they were arrested in his presence and brought down.

A. They were not arrested in my presence.

Q. Did they come down with you in charge of the marshal?

A. No, I came down first—they were arrested upon the ground and the marshal served papers on me down at my residence.

Q. This work of going on the Ebner Gold Mining Company's property and all the work that was being done there except the work that was being done under this defendant company, was being done under your supervision, was it not? A. It was.

Q. I will ask you whether or not the party who made the complaint against you in Grover Winn's

(Testimony of Al Black.)

court also asked that you be bound over to keep the peace?

Objected to as not the best evidence. Objection sustained.

Judge WINN.—I am doing this to show the methods the defendant company used and the apprehension which Mr. Mackey, who was [436] at the head of this work, was working under when these people went in there and kept by degrees forcing their way in and upon the property until they got the flume constructed clear across the Parish Number 2 claim.

Objection sustained. To which ruling of the Court counsel for plaintiff is allowed an exception.

Whereupon court took a recess until 2 P. M.

Afternoon Session.

Judge WINN.—I desire to withdraw Mr. Mackay for a moment and recall Mr. Black.

By the COURT.—Very well. [437]

[Testimony of Al Black, for Plaintiff (Recalled).]

AL BLACK, recalled by the plaintiff for further redirect examination.

(By Judge WINN.)

Q. When you were arrested up there on the third of October and brought down to Juneau, I will ask you whether anyone was arrested along with you at the same time and brought down with you when you came.

Same objection. Objection overruled. Defendant allowed an exception.

A. There was Mr. Hunsucker and Mr. Seitz.

(Testimony of Al Black.)

Q. Mr. Macker didn't come down at the same time?

A. No; he was down here, I guess.

Q. Now, I will ask you, when this arrest was made up there on the third, as to whether or not the marshal did or did not arrest everybody that was in sight and at work up there on the Lotta and Parish claims.

Objected to as incompetent, irrelevant and immaterial.

Objection sustained.

Q. On the third, at the time the marshal came up there with his deputy, do you know whom he was accompanied by, whether there was anyone with the deputy marshals or marshal—do you know Mr. Burch? A. Yes, Mr. Burch was along.

Q. I will ask you how many men there were working on the Lotta and the Parish #2 at those places you described in your evidence this morning on the right-hand side of the creek as you go up when the marshal came up there and made the arrest?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial, and on the further ground that it carries two [438] questions and suggests an answer to the witness.

Q. Well, I will ask you whether or not these men were working on the Lotta and Parish claims up there?

Objected to as leading. Objection sustained.

Q. About the question of working on both claims I will leave that out. I will ask you, Mr. Black, who was up there the day that the arrest was made on the third of October, the time you were arrested. Name

(Testimony of Al Black.)

the men that were working over on the workings you described in your evidence this morning, over on the Parish or Lotta, or the Lotta and Parish both together.

Same objection. Objection overruled. Defendant allowed an exception.

A. Well, there was some of them there was new men, I don't just know their names but there was—I knew Al Graham was there, Reardon was there, Adolph Myer, Billy Moore and Ed Seitz was there.

Q. Now, I will ask you if they were there in sight upon this work at the time the arrests were made of you and Hunsucker and Seitz—these other men, were they there or what had become of them?

A. Well, I was arrested up at the boarding-house and Seitz was there at the boarding-house and Hunsucker, I ain't sure whether they found him down there on the works or on the trail coming from the works.

Q. I thought you said you were all arrested at the same place. Then you were not down there at the works at the time the other parties were arrested over at the—you were at the boarding-house?

A. I was at the boarding-house when the marshal and Burch came over. [439]

Q. But you three people did come down to Juneau together, you and Sietz and Hunsucker?

A. Seitz and I came down together and Hunsucker came later on and the marshal and Mr. Burch, they went down the other way looking for some more men, but he couldn't find them—it was getting late.

(Testimony of Al Black.)

Mr. HELLENTHAL.—We ask to strike that—

By the COURT.—The latter part of the answer will be stricken as not responsive to the question.

Q. Then, I will ask you if the marshal or his deputy and Mr. Burch were making search for any other men there at the time you came down and I left.

A. They were.

By Mr. HELLENTHAL.—We object to that question.

By the COURT.—It is answered—you may cross-examine on it and if it develops he did not have some knowledge on the subject it will be stricken.

(By Mr. HELLENTHAL.)

Q. I understand that the marshal came up there and notified you and Graham and Seitz that you were under arrest?

A. No, not Graham—he notified—I was alone there and he had my name and he had Seitz's name and Hunsucker's and Mackey—then he asked me about some fellows—name of Doe and Hoe and one thing and another, and I told him there was no men of that name there.

Q. He asked you who else was up there at the time those blasts were fired, didn't he?

A. No, he did not.

Q. He didn't ask that? A. I don't think so.

[440]

Q. That is what you understood him to be after?

A. Yes.

Q. To find out who the other men were?

A. Yes.

(Testimony of Al Black.)

Q. That were there when the blast was fired?

A. The men that were working there, I suppose, is what he wanted.

Q. Then you and Graham and Seitz went down town alone—you didn't go in the custody of the marshal.

A. Yes; he went down and I told him I would go on down and he said he would wait at the bridge, and he came down the other flume, you see, and when we got down he was there at the bridge.

Q. And you gave bail when you got down here?

A. Well, they had us here until about 9 o'clock.

Q. You didn't get here until shortly before 9?

A. Yes, we were down here just a little after dark.

Q. That time of the year what time does it get dark? A. October. It gets dark pretty early.

Q. That was October? A. The third of October.

Q. You had had your dinner at the mine when he found you? A. Yes, sir.

Q. And you came down here and were released about 9 o'clock?

A. I wouldn't say it was 9. It was along in the evening. I knew it was before I had my supper.

Q. Where were you—take a look at this plat here. There is the Lotta lode and there is the house that you were testifying about. Where were you with reference to that property? At what place were you blasting from?

A. There, somewhere—probably above this dam (indicating).

Q. Just mark it. [441] A. I couldn't mark it.

(Testimony of Al Black.)

Q. Just above the dam, about the place where "1888" is?

A. It was somewhere in there (indicating)—between that and where it says "Alaska-Juneau" here.

Q. It was on the Lotta lode? A. Yes, sir.

Q. And it was while they were working, not where the present dam is, but where the original point of diversion was?

A. When he arrested me I was up here (indicating).

Q. I am talking about when the shots were fired which caused the arrest?

A. It was up here (indicating).

Q. Near the figures "1888"?

A. Well, somewheres along here—I wouldn't say just exactly.

Q. It was on the Lotta lode?

A. It was on the Lotta lode; yes, sir.

Q. What were you doing when you fired the blast—what sort of work were you engaged in?

A. Well, they were blasting—they were rolling down rocks.

Q. You were on that sidehill there?

A. Yes, sir.

Q. Were you driving a tunnel?

A. It was on the Lotta—no, we were not driving a tunnel on the Lotta—we had a little open cut there.
(By Judge WINN.)

Q. Where were you driving a tunnel? Were you doing anything on the Parish #2 at that time?

Objected to as leading.

(Testimony of Al Black.)

Q. Were you doing anything or not doing anything on the Parish #2?

Objected to. [442]

By the COURT.—Ask him if he knows on what claim they were working.

Q. Were you doing any other work, on any other claim near the Lotta there, at the time that these arrests were made on the third of October?

A. There was men working on the Parish #2—Al Graham and Mike McKenna. Mike McKenna was alone there in the afternoon, in the lower tunnel.

Judge WINN.—That is all.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. The lower tunnel? A. Of the Parish #2.

Q. Come here and show me where that was.

A. Here it is—it is just above the creek.

Q. The place marked “tunnel,” between the line marked Alaska-Juneau flume and Gold Creek?

A. Yes.

Q. Were you working down there?

A. No, I was not.

Q. But you know about their being down there from what they told you?

A. No, I know they were down there, because I sent the men down there.

Q. Were they blasting or rolling any rock?

A. No, they were working in the tunnel. Graham was there on the third and so was McKenna.

Q. There were only three people arrested around there besides Mackey? A. Yes.

(Testimony of Al Black.)

Q. Were there ever any more arrests made?

[443] A. There was arrests made afterwards.

Q. I mean at that time? A. Four, was all.

Q. It was some weeks before any further arrests were made?

A. I was down at Ketchikan. I don't know much about that.

Q. You don't know about the subsequent arrests?

A. I heard about it.

Q. Personally, you were not there and couldn't testify? A. No.

Q. How many men did that leave on the property—with three of you and Mackey gone, how many men did that leave on the Ebner property?

Judge WINN.—I object to that. We were confining ourselves to the Lotta and Parish.

Objection overruled. Plaintiff allowed an exception.

A. I couldn't say exactly how many. There were some men over there. I told them to go away and hide when the marshal came.

Q. How many men did it leave on the property?

Judge WINN.—You mean the entire property?

Mr. SHACKLEFORD.—On the Ebner property, as you call it.

Judge WINN.—That includes the high line flume and everything. I object to it if it does.

Q. How many men were working up on the Ebner mine on that day? A. There was about fifteen.

Q. How many on this job that you described as blasting rocks down toward the creek?

(Testimony of Al Black.)

A. Well, there was some went home and there were some up there—we were arrested along in the evening, just about dark.

Q. About dinner-time? A. About dark.

Q. And how many men did you have working with you on the Lotta [444] lode survey 87, near the point marked 1888 on the map?

A. There were eight or ten men there.

Q. And out of that eight or ten men, you were the only one arrested? A. No.

Q. Who else was arrested?

A. There was Ed Seitz and Hunsucker.

Q. Graham was not arrested.

A. No; Al Graham was not arrested.

Q. Three out of eight or ten men?

A. Mackey was arrested too.

Q. He was not working there?

A. He was not working there.

Q. And he was not there at the time the shots were fired? A. Not that I know of.

Q. (By Judge WINN.) What became of these other men and why was it the marshal didn't find them?

Objected to. Objection overruled. Defendant allowed an exception.

A. I told them to get in the brush or get out of sight, that the marshal was coming.

Witness excused. [445]

Judge WINN.—I desire to offer in evidence and read into the record a copy of the complaint upon which Mackey, Black, Seitz and Hunsucker were ar-

(Testimony of Al Black.)

rested, the original complaint—I desire to read it into the record. I desire to do it for the purpose I have indicated, to show to the Court that both the complaint itself—it is verified by Mr. Kenzie—and the warrants that were issued thereon recite the fact that Burch was to accompany the marshal and point out to him the John Does mentioned in the complaint and in the warrant. I desire to show that they went up there with this warrant and arrested everybody on the Lotta claim and the Parish #2. It is true that there were some others there that day and had been working there that day, but we will show how they got out of it and why they were not arrested; and I also desire to offer the warrant to show the action under which these people sought to take possession of the property.

Mr. SHACKLEFORD.—I object to it as incompetent, irrelevant and immaterial—each case stands on its own footing—and on the further ground that the questions involved in this matter are not subject to collateral attack.

Objection overruled. Defendant allowed an exception.

Judge WINN.—I now offer in evidence the complaint, which is sworn to by Mr. Kenzie on the third day of October, 1910, which furnished the basis for the issuance of the warrants for the arrest of Mackey, Black, Seitz and Hunsucker, and I will ask that the stenographer copy it into the record and make it a part of the record. I also offer in connection therewith the warrant upon which these parties were ar-

(Testimony of Al Black.)

rested, and ask that it be copied into the record and made a part of this case.

Same objection. [446]

By the COURT.—The main purpose seems to be to show that they were arrested at the instance of the superintendent of the Alaska-Juneau; they will be admitted.

Defendant allowed an exception to the ruling of the Court.

Judge WINN.—Both the complaint and warrant states that Mr. Burch would identify these John Does and Richard Roes. It is in the case of the United States versus Angus Mackey and others.

They are marked Plaintiff's Exhibits "X" and "Y" and copies are attached hereto and made a part hereof.

By the COURT.—They may be temporarily withdrawn from the files in that case and returned to the files when copied by the stenographer.

Mr. HELLENTHAL.—You will follow this up, I understand, with the verdict of the jury.

Judge WINN.—I will if you want to—any time you please. There is another paper I desire to offer in the proceedings before Grover Winn. It shows that the attorneys of the Treadwell people were associated with the district attorney in the prosecution of this case.

Mr. SHACKLEFORD.—The warrant is further objectionable unless counsel offers with the warrant the return on back of same.

Judge WINN.—If they want to offer any of these

(Testimony of Grover C. Winn.)

matters they may do so.

Mr. SHACKLEFORD.—The warrant is incomplete.

By the COURT.—I will entertain your offer if you care to offer any part of the record. The objection will be overruled.

Defendant allowed an exception to the ruling of the Court.

Judge WINN.—I will call Grover Winn. [447]

**[Testimony of Grover C. Winn, for Plaintiff
(Recalled).]**

GROVER C. WINN, recalled as a witness in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. You are the United States commissioner for the Juneau precinct? A. Yes, sir.

Q. How long have you been in that position?

A. Since August 3, 1910.

Q. Have you a record of criminal matters that are prosecuted in your court? A. I have.

Q. You keep it in the form of what sort of book?

A. Criminal docket.

Q. Now, I wish you would turn to the case of United States vs. Mackey and others, wherein they were charged with having committed the crime of assault, I think, with a deadly weapon or assault with intent to kill, on the third day of October, 1910, and arrested on a warrant sworn out by Mr. Kenzie, superintendent of the Alaska-Juneau Gold Mining

(Testimony of Grover C. Winn.)

Company. A. Yes, sir.

Q. You have the proceedings? A. I have.

Judge WINN.—I will state to the Court that the orders I am about to offer in evidence by the commissioner deal with two cases,—one is the case that was made out against Mr. Mackey, Black, Seitz and Hunsucker by reason of a complaint verified by Robert A. Kenzie on the 4th day of October, 1910, upon which complaint he sought to have these parties bound over and put under bond to keep the peace, and the orders I am about to have read or offer in evidence to the Court [448] from the criminal docket deals with both cases, and shows the disposition of this other case at that time, and I offer in evidence the complaint in that case—that is, the original in the case where they were bound over to keep the peace. Both cases were disposed by the commissioner at the same time and the orders entered are intermingled.

Mr. HELLENTHAL.—We object for the reasons offered against the former offer of the warrant and the complaint in the former case, and for the further reason—certainly no one can object to keeping the peace and a complaint against anyone, asking them to keep the peace, does not hinder them from doing any lawful thing whatsoever or couldn't affect their doing a lawful thing, and if it was an unlawful thing they were about to do, certainly they should be bound over. It has no materiality and no effect upon these parties whatsoever, and no further action was taken on the complaint except that it was dismissed.

(Testimony of Grover C. Winn.)

Judge WINN.—This binding over case came up at the same time that Mr. Mackey and others were having the preliminary hearing before Judge Winn. It will show an agreement that was entered into between the attorneys for the Treadwell Company and the United States District Attorney, entered into with Mr. Burton,—that these parties had promised to do certain things if the bond was waived, and there is a stipulation entered in there by which our people were to go back on the claim, and we follow it up by showing that we did afterwards go back on the claim and go to work where it was agreed we should do it, and we were arrested again on the first day of November. It shows the complaint was being prosecuted more particularly by the defendant company, because their attorneys were there representing them and entering [449] into stipulations, etc. It shows the disposition of this case and the other case in Grover Winn's court.

Objection overruled. Defendant allowed an exception.

Mr. HELLENTHAL.—If Judge Winn will show a stipulation to which I was a party of the character he announces, I will withdraw all objection to this testimony.

Judge WINN.—We desire to have marked for identification the original complaint sworn to by R. A. Kenzie on the 4th day of October, 1910, before G. C. Winn, which is termed "Information and Complaint of Threatened Crime."

Q. Please turn to this book of criminal procedure

(Testimony of Grover C. Winn.)

or the criminal docket in your court, and I will ask you if you have any entries in there with respect to the disposition of this bind over to keep the peace case, and also the charges that were preferred against Mr. Mackey and others for assault with intent to kill. A. I have.

Q. It consists of about one page of your record?

A. Yes; on the information of a threatened crime it consists of one page; the other is two pages. This is on the information for a threatened crime.

Judge WINN.—We desire to offer in evidence page 222 of the criminal journal of the commissioner's court at Juneau and we ask that it be read into the record.

Mr. HELLENTHAL.—We object to that as incompetent, irrelevant and immaterial—it neither proves nor disapproves any of the issues in this case.

By the COURT.—I have doubt whether there is any variety attached to this docket, but it will be admitted subject to argument on that question, if it should be of any vital moment in the case. [450]

To which ruling of the Court counsel for defendant is allowed an exception.

The WITNESS.—(Reading:)

[Exhibit—Page 222 of Criminal Journal.]

In the Justice's Court, Juneau Precinct.

UNITED STATES OF AMERICA

vs.

ANGUS MACKAY, ED SEITZ, AL BLACK and
E. S. HUNSUCKER.

1910—October 4th.

Complaint made and sworn to by R. A. Kenzie charging information and complaint of threatened crime.

Warrant issued for arrest of defendants—October 5th, warrant returned endorsed “Hereby certifying that I received the within warrant on the 4th day of October, 1910, at Juneau, Alaska; that I served the same on the same day and place, by arresting the within named defendants, Angus Mackey, Al Black, Ed Seitz and E. S. Hunsucker and will now produce them in court. Dated Juneau, Alaska, October 5, 1910. Marshal’s fees for service, \$12. H. L. Faulkner, United States Marshal, Hector McLean, office deputy.

October 5th—as the defendants were already before the Court upon another charge, they waived their rights to a hearing until the other (the first charge) herein was completed.

October 7th—complaint read to the defendants and nature of charge explained. Mr. Burton, as counsel for the defendants, stated that they had no desire to break the peace or destroy property. Mr. Hellen-thal and Mr. Bayless in court as counsel for Treadwell,—Mr. Rustgård appearing for Government. Mr. Rustgård stated that if these men would give their word to keep the peace, he thought it sufficient. Mr. Burton stated that his clients would give their word not to interfere with work of the Juneau-Alaska people. Ordered by the Court that irrespective of title and rights to land that each party was

(Testimony of Grover C. Winn.)

to be [451] allowed to proceed to work then under way, without interference with the other side.

Defendants promised and understood by all parties.

Defendants ordered discharged.

Judge WINN.—That is all.

By Mr. HELLENTHAL.—These entries were made by you at the time this case was tried before you? A. Yes, sir.

Mr. HELLENTHAL.—That is all.

Witness excused.

Judge WINN.—I will now recall Mr. Mackey. [452]

**[Testimony of Angus Mackey, for Plaintiff
(Recalled).]**

ANGUS MACKEY, recalled—Continuation of direct examination.

(By Judge WINN.)

Q. Did you or did you not know when you took charge of the property up there in 1910 that there were some unpatented claims that you had to do the assessment work on? A. Yes, sir.

Q. I will ask you if this work that you did up there, if you intended it and directed it towards the assessment work on those claims as well as the opening up and development of the property.

Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion and leading.

Objection sustained as leading.

Q. I will ask you if you went up there to do the assessment work on the property there in 1910,

(Testimony of Angus Mackey.)

whether you did it or not.

Same objection.

By the COURT.—If it goes to the intention of whether he did do it, he may answer.

Defendant allowed an exception.

A. Yes.

Mr. SHACKLEFORD.—We move to strike the answer as stating a conclusion of the witness.

By the COURT.—The answer stands as an answer to the question if he went up there to do the work.

Defendant excepts. Exception allowed.

Q. I will ask you if you did any assessment work on those unpatented claims that year.

A. I did—I had it done.

Mr. SHACKLEFORD.—I move to strike that answer on the ground that the answer calls for a conclusion. [453]

Objection overruled and motion denied. Defendant allowed an exception.

Q. Besides the work you have already described to the Court this morning that you did, I will ask you if you did any additional work on any unpatented claim up there, leaving out the question of the Parish #2—I believe you described this morning what you did on the Parish #2—I will withdraw that question. How many men did you have, off and on, working up there on the various places on this Ebner property during the year 1910, that is, I mean, approximately,—the average number of men you had working?

Mr. SHACKLEFORD.—We object to that as call-

(Testimony of Angus Mackey.)

ing for a conclusion of the witness and not the best evidence.

Objection overruled. Defendant allowed an exception.

A. I had from fifteen to sixty.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. What is your position?

A. I am superintendent of construction, is my position—I am acting superintendent at present.

Q. For whom? A. For the Ebner mine.

Q. For the Ebner mine? A. Yes.

Q. You are not employed by the California & Nevada Copper Company?

A. This work is done on the Ebner mine.

Q. Whom are you employed by and whom have you been employed by since you have been working up there on this property?

A. I was employed by F. L. Underwood of New York.

Q. Did he pay you?

A. Yes, he paid me. [454]

Q. Then, you don't represent the California & Nevada Copper Company?

A. Yes, the California & Nevada Copper Company; yes, sir.

Q. As a matter of fact, your employer—

A. You asked me who I was employed by and I told you F. L. Underwood.

Q. Acting for the California & Nevada Copper Company?

(Testimony of Angus Mackey.)

A. For the California & Nevada Copper Company and the Ebner mine—the work is done on the Ebner mine.

Q. But you are actually employed by the California & Nevada Copper Company? A. Yes, sir.

Q. And have been during the times you have been up on this property known as the Ebner property—you have been in their employ during all that time?

A. Yes, sir.

Q. Now, all the men employed by you in connection with this work are employed by you as employees of the California & Nevada Copper Company, were they not?

Judge WINN.—We object to all this testimony on this particular point, and if your Honor overrules it, we ask for an exception. My objection is that it is incompetent, irrelevant and immaterial. It has already been shown in the case that title to the property is vested in the Ebner Gold Mining Company and they could not prove any title or right to possession, etc., by evidence of this kind.

Objection overruled. Plaintiff allowed an exception.

Q. You say that all the men that were employed by you in connection with this work were employees of the California & Nevada Copper Company and were paid by the California & Nevada Copper Company?

A. The California & Nevada Copper Company, on the Ebner mine. [455]

Q. On work in what is known as the Ebner mine?

A. Yes, sir.

(Testimony of Angus Mackey.)

Q. And they were not employed by Mr. Ebner or the Ebner Company. A. No, not at all.

Judge WINN.—We object to that last question and the conclusion of the witness as not the best evidence.

By the COURT.—I think I understand the testimony. Objection overruled. Plaintiff allowed an exception.

Q. You took possession of this property for the California & Nevada Copper Company?

Judge WINN.—We object to the question as calling for a conclusion of the witness and not the best evidence.

Objection overruled. Plaintiff allowed an exception.

A. No, I didn't take possession. Mr. Bent took possession—Geo. E. Bent was the manager.

Q. And he left you here in charge?

A. Well, yes; when I came up I had charge but I was working in Seattle getting the timber work ready.

Q. George E. Bent was manager for the California & Nevada Copper Company? A. Yes.

Q. Now, you and Mr. Bent came up here together with Mr. O'Boyle and Mr. Briggs and some other man who was interested in the California & Nevada Copper company, did you? A. Yes, sir.

Q. All came up together?

A. No, not together. I came up after they did.

Q. Were they here when you got here?

A. Yes, I met them here.

(Testimony of Angus Mackey.)

Q. Now, on the third day of October, which you have been referring to so much in your testimony, how much of this [456] flume that you say four thousand feet of it had been constructed was then constructed?

A. Well, there was considerable work getting ready for the flume, that is, for the flume proper.

Q. The flume had not been started?

A. You mean—

Q. The 4,000 feet of flume itself?

A. They start the flume as soon as you begin working the right of way—that is, part of the flume.

Q. I mean the flume structure, for which you have been constructing the timber work, the flume?

A. No, it was some time afterwards, but the grade is part of the flume, I want you to understand.

Q. I understand you to say that you have spent \$35,000 for machinery, approximately? A. No.

Q. That is the entire amount spent to date?

A. Not counting the machinery.

Q. Thirty-five thousand, not counting the machinery? A. Approximately.

Q. You mentioned your machinery on the dock here—how much did you put that at?

A. I believe I mentioned one-fifth of the purchase price was paid on the machinery before it was shipped.

Q. That is your conclusion?

A. Yes, according to the terms of the contract.

Q. The machinery is here on the dock?

A. Part of it.

(Testimony of Angus Mackey.)

Q. Not consigned to the California & Nevada Copper Company nor to the Ebner Company, is it?
[457] A. I don't know that.

Q. The freight on it has not been paid, has it?

Objected to as incompetent, irrelevant and immaterial. Objection sustained.

Q. What is the grade of that flume?

A. What do you mean?

Q. The flume you have mentioned—what is the grade of it?

A. In what way? What do you mean by the grade?

Q. Have you an average grade on it?

A. Yes, sir.

Q. And the grade is the same all the way around?

A. Pretty much.

Q. What is the grade? A. By the road or what?

Q. The way you ordinarily describe the grade—if you were describing the flume you would say a flume so many feet by so many feet in size, with a grade of what?

A. It has got about approximately 11 feet fall from the dam to the penstock.

Q. And what is that distance? Do you know what that percentage of grade is?

A. No, I didn't figure up the per cent.

Q. Now, you came up here first—what time did you take charge, the third of August, 1910?

A. No, really about the 11th of August, and then I went down below again, the tenth or eleventh, something around that.

(Testimony of Angus Mackey.)

Q. So you had nothing to do with the property until about the 11th of August?

A. No, nothing.

Q. And then you went below. How long were you gone?

A. I was gone some time. I can't remember just exactly. [458]

Q. You got back here in September, some time in September? A. Yes, sir.

Q. Were you here when the company brought its first injunction suit to prevent us from occupying the Lotta and the Parish ground? A. No.

Q. You knew when you got back that such a suit had been brought? A. I heard talk of it.

Q. And as soon as you arrived here you knew that we claimed the right, that is to say, the Alaska-Juneau Company claimed the right, to take the water out of the creek somewhere in the vicinity of the Parish-Lotta side line?

A. Yes; I understood you were trying to jump our water right.

Q. And you knew we had made locations in that vicinity? A. Yes, I understood you had.

Q. And you knew that there was a man up there working on the water right, didn't you? A. No.

Q. Mr. Harry? A. Is that your gun-man?

Q. I don't know.

A. There was a gun-man-Harry, they called him—up there.

Q. O. M. Harry—you knew there was a man up there?

(Testimony of Angus Mackey.)

A. I understood there was a man by that name living in the cabin that was built while I was down below.

Q. And built along the line of this flume?

A. I believe down underneath the flume.

Q. And you knew, also, that they were driving a tunnel in the neighborhood of Snowslide Gulch, for the purpose of carrying the flume under Snowslide Gulch? A. No. [459]

Q. You didn't know that?

A. No, not at that time.

Q. You knew enough to know what the Alaska-Juneau people had started out to do?

Judge WINN.—I object to the question as calling for a conclusion of the witness and as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

A. Yes, I understand they tried to steal the water right—that is the way I understood it.

Q. Yes; and you understood that you tried to get them off the property and hadn't succeeded, by an action in court?

Judge WINN.—I object to that—that is not the best evidence.

Objection overruled. Plaintiff allowed an exception.

A. I have already answered that question—I was not here at that time.

Q. But when you got back, that was your understanding of the situation?

(Testimony of Angus Mackey.)

Judge WINN.—Same objection. The record is here and is the best evidence.

Objection overruled. Plaintiff allowed an exception.

A. Yes.

Q. And then, under those circumstances you employed a gang of men and told them to go on the Lotta lode and blast down the hill, so as to interfere with the men that were working below?

A. We were doing the work on the Parish and Lotta—we were making trails so our men could get around.

Q. You had no intention of blasting on the men below?

A. We had a right to blast on the ground that was patented.

Q. And that is where you ordered the blasting done? [460] A. Yes, sir.

Q. And that was for the purpose of getting rid of the men of the Alaska-Juneau on the ground?

A. We were working on the Parish.

Q. Did you put the men to work on the Parish?

A. I did.

Q. That was after you got back here?

A. That was after I got back here.

Q. And about the same time you employed this gang of men to go up on the sidehill and blast down where the Alaska-Juneau men were working?

A. No; it was some time after that.

Q. How long after?

A. It was about the 18th of September I put them

(Testimony of Angus Mackey.)

to work on the tunnel.

Q. Where did you put the men to work—

A. On the Parish.

Q. (Continuing.) —on the sidehill above?

A. And shortly after that we started another tunnel up above.

Q. In the Lotta? A. No, in the Parish.

Q. Parish #2? A. Parish #2.

Q. Where was this blasting done that Mr. Black was arrested for? A. On the Lotta.

Q. And when was it you put him and his crowd up there above the men that were working for the Alaska-Juneau?

A. They were working up there before the Alaska-Juneau started to work up there.

Q. You put them on the sidehill of the Lotta—to blast on the Lotta? [461] A. Yes, sir.

Q. Before anybody started to work below for the Alaska-Juneau,—on the Lotta? A. Yes, sir.

Q. That was a patented claim?

A. That was a patented claim, as I understand it.

Q. And you at that time were adopting a general system for the development of the property, were you not? A. Yes.

Q. Which contemplated a crosscut tunnel from beyond the Cape Horn lode under the whole property? A. Yes.

Q. Now, will you kindly state to the Court the object of development the surface ground of the Lotta lode at that particular point.

Objected to. Objection overruled. Plaintiff al-

(Testimony of Angus Mackey.)

lowed an exception.

A. To keep possession of the claim.

Q. Of the Lotta? A. Yes, sir.

Q. Why, to keep possession of the Lotta?

A. To keep possession from jumpers.

Q. What sort of work were they doing?

A. Who? Your people?

Q. Your people.

A. They were making trails across there, so they could get down to the Parish #2, to the two tunnels we were working on.

Q. I will hand you the opinion of the Court filed in #803-A on the 6th of September, 1910. Before that time and upon your arrival here, you became acquainted with the contents [462] of that opinion, didn't you?

Judge WINN.—We object to this paper. I think there is a certified copy of Judge Lyons' opinion among the files and this is not certified.

Objection overruled. Plaintiff allowed an exception.

A. No, I did not.

Q. Didn't know anything about that?

A. Except I knew there was a suit; that is all.

Q. You knew there was a suit and that you had lost in your effort to have our men enjoined from going on the property—you knew that, didn't you?

A. I believe that is my understanding.

Q. Now, Mr. Mackey, I understood you to say in your direct examination that you sent some men on the Parish Claim #2 after your return here in Sep-

(Testimony of Angus Mackey.)

tember, for the purpose of doing the assessment work?

A. Doing the requisite amount of work to get a patent.

Q. The claim had been located in 1899?

A. I don't know.

Q. You don't know anything about that?

A. No.

Q. You have been consulting frequently in the getting up of these pleadings,—you have had a good deal of consultation with your lawyers about this title, haven't you?

A. No, I haven't taken much interest. The lawyers attended to that.

Q. So without making any inquiry as to the age of that claim and the number of years of assessment work that had been done upon it, you concluded to do considerable more assessment work, so you could get a patent?

A. That was the Parish #2 and the Parish #1, was two claims [463] that the assessment was required to be done upon.

Q. I am talking about putting your men on there doing enough work to get a patent—how did that suggest itself to your mind?

A. Through the company's attorneys.

Q. You were advised that there wasn't enough work there yet to get a patent?

A. Yes; I was advised there wasn't the requisite amount of work to get a patent.

Q. Now, then, Mr. Mackey, with reference to

(Testimony of Angus Mackey.)

putting this amount of work on the Lotta sidehill, I understand you to say that originally you had no intention of putting them there for blasting rocks down on the Alaska-Juneau people.

A. I never have testified to any such thing as that and none of the men have testified to that.

Q. Blasting so the rocks would roll down the hill and interfere with them?

A. We certainly tried to keep them off the ground, if that is what you mean.

Q. And that is what you originally put that gang of men to work there for?

A. What do you mean by a gang?

Q. The eight or ten men that Black testifies to?

A. Yes; I put several men to work up there, yes.

Q. And you put them there for the purpose of blasting, so the rocks would roll down the hill and interfere with the Alaska-Juneau men's work down below, didn't you?

Objected to as repetition. Objection overruled. Plaintiff allowed an exception.

A. Yes, I put them there to hold the property if I could. [464]

Q. And you put them there for the purpose, among other things, of blasting, so the rocks would roll down on them?

A. If you mean I put them there for the express purpose of hurting somebody, you are speaking something that is not true.

Q. The rocks might have missed them, but I am asking you the question if you did not put them

(Testimony of Angus Mackey.)

there for the purpose of blasting, so the rocks would roll down the hill in the vicinity of where they were working.

A. They have always had warning. Whenever there was rocks rolled down or blasted down, the men below had warning.

Q. I am asking the purpose for which that gang of men were put on the sidehill of the Lotta—wasn't that the purpose?

A. The purpose was to hold possession of the ground.

Q. And to blast so the rocks would roll down the hill and interfere with the Alaska-Juneau men working below?

A. I certainly was going to hold possession,—if rolling down rock would do it.

Q. Answer my question. Wasn't that the purpose you put the men there for?

A. Partly for that, and partly for building trails.

Q. Did you make an examination of the Parish lode with reference to the amount of work that had been done upon it before, when you decided how much work you wanted to do, in order to complete the necessary work for patent proof?

A. Well, I had the surveyors go over it to see how much work was requisite, to do the work that had to be done. They knew the amount, and I didn't.

Q. How much work did you calculate on doing in order to complete the amount necessary to obtain a patent? [465]

(Testimony of Angus Mackey.)

A. The requisite amount of work for the patent.

Q. How much work do you estimate had already been done and how much did you estimate you had to complete?

Objected to as not the best evidence. Objection overruled. Plaintiff allowed an exception.

A. I don't remember now how much it was—I couldn't state, but the surveyors claimed there wasn't enough work done.

Q. So you had some more work done?

A. So I had some more work done.

Q. How many feet did you drive in that tunnel last fall?

A. I don't know now. I didn't go down and measure it after it was done. I had the surveyors do that.

Q. Didn't you give your foreman some instructions as to how much work he had to do there?

A. No; we kept on working there.

By the COURT.—What tunnel?

Mr. SHACKLEFORD.—I mean the tunnel in which the work was done—between the Alaska flume and the creek—that is where a particular amount of work was done.

The WITNESS.—On both those tunnels, one above the flume and the other under it.

Q. One was on one side of the creek and the other on the other?

A. No, both on the same side.

Q. Both on the right-hand side going up?

A. Both on the right-hand side going up.

(Testimony of Angus Mackey.)

Q. Now, I want you to tell the Court how much you calculated on doing there?

Objected to as repetition.

By the COURT.—Can you not tell how much you intended to do to be sure to have enough for patent in dollars and cents? [466]

A. I calculated to have fully \$500 or more.

By the COURT.—How much additional work did you calculate to do when you took charge before applying for patent,—that is, what he is asking you? If you remember now, you can state; if you do not, you can say so. A. I can't remember now.

Q. Do you know how much work you actually did before you stopped the men, on Parish #2?

A. No, the surveyor, he measured up the work.

Q. I don't mean in feet—how many men did you keep there, and how many days did you have them?

A. We had a number of men there at different times.

Q. Could you give me any idea, approximately, of the cost of the work that you did, for the purpose of perfecting your assessment work for patent?

A. I couldn't do it right offhand.

Q. Can you do it a little later? A. I might.

Q. Now, there has been some testimony here concerning the arrest which followed the explosions on the Lotta side-hill early in October—you were not detained in the custody of the marshal, were you?

A. No.

Q. You and three other men were arrested?

A. Yes, sir.

(Testimony of Angus Mackey.)

Q. How many men did you leave at the mine?

A. There was six or eight up there, probably,—there was eleven up there.

Q. Eleven altogether?

A. Yes; there was some more men working on the other side.

Q. You and the other defendants were convicted in the case [467] of the United States versus Mackey and the three other men?

A. I don't know as we were convicted.

Q. You were sentenced—you were fined, were you not? A. Fined, I believe.

Q. This work you started Al Black at—that was way up on the Golden Fleece lode—survey #91, in the vicinity of the Golden Fleece?

A. It is up at the Ebner dam,

Q. It is at the point marked in the conflict between the Crown Point and the Golden Fleece lode, upon the plat, is it not?

A. I believe the Ebner dam is marked on that map there.

Q. The place marked Ebner dam? A. Yes, sir.

Q. All these men employed by you were working under you and you were working under Mr. Bent?

A. Yes.

Mr. SHACKLEFORD.—That is all.

(By Judge WINN.)

Q. Mr. Shackleford has questioned you quite at length upon your employment with the California & Nevada Copper Company. Now, I want you to tell me just the facts about your employment. You say

(Testimony of Angus Mackey.)

a man by the name of Underwood employed you. Where does Underwood live?

Objected to as not proper redirect examination. Objection overruled. Defendant allowed an exception.

A. His office is on Broadway, New York.

Q. Now, with whom did you have your understanding to come out here and commence the work,—was it with the California & Nevada Copper Company, or was it with this man Underwood? [468]

A. It was Underwood I had my agreement with.

Q. Did you have a written agreement with him or oral one? A. An oral one.

Q. What were you to come here and do—were you to come out here and superintend the mines or build a mill? A. Superintend the construction work.

Q. Now, Mr. Shackleford asked you a question which was intended to convey to you that you came up here or that you met some people here, a man by the name of O'Boyle and Briggs, etc., and intended to convey to you that you knew that these men were coming here representing the California & Nevada Copper Company. Where did you first meet O'Boyle and Briggs? A. In New York.

Q. Did O'Boyle have anything to do with hiring you? A. No.

Q. Did Briggs have anything to do with hiring you? A. No.

Q. Then, when you got out here in the summer of 1910, you met those two gentlemen here in Juneau and Mr. Bent, didn't you?

(Testimony of Angus Mackey.)

A. Yes, Bent wired me to meet them. I was in Seattle.

Q. Did those parties have anything to do with the contract of hiring or engaging you to do this service you have been testifying concerning?

A. No; my engagement was through Mr. Underwood.

Q. Did Underwood ever tell you he had an option upon the stock of the Ebner Gold Mining Company? A. No.

Q. You don't know anything about the stock?

A. No.

Q. Now, when you got out here at Juneau, you had already had [469] an understanding that you were to come here and take charge of the construction work upon this property? A. Yes.

Q. Did you have any additional understanding with Mr. Bent what your duties should be?

A. Mr. Bent wanted me to look after the other department while he wasn't here.

Q. That agreement you had with Mr. Bent?

A. That agreement I had with Mr. Bent,—just that point, yes.

Q. You don't know who Mr. Bent was acting for or anything about it?

Objected to as leading. Sustained.

By the COURT.—He asked you who Mr. Bent represented and you said you didn't know.

A. Yes, sir.

Q. The money that has been sent out here to you has come through apparently what company to you?

(Testimony of Angus Mackey.)

A. The California & Nevada Copper Company.

Q. Have you explained to the Court about all you know about this contractual relation between you and the California & Nevada Copper Company—you have explained it all, have you? A. I think so.

Q. You don't know what arrangements either Mr. Bent or Mr. Underwood have with the California & Nevada Copper Company,—not a thing, do you?

Objected to as leading. Objection sustained.

Q. I will ask you whether or not you know anything about any agreement between Bent and the California & Nevada Copper Company and Underwood and the California & Nevada Copper Company—do you know anything about it? [470]

A. I don't know anything about the arrangement.

Q. Do you or do you not know anything about any agreement made by that company with Mr. Ebner, either individually, or Mr. Ebner on the part of the Ebner Gold Mining Company?

By the COURT.—He has answered he don't know.

Q. Now, Mr. Shackleford questioned you considerably about some work that was being done upon one end of the Lotta lode claim, on the right-hand bank of Gold Creek as you go up the creek. Sometime about October third and prior thereto, you spoke something about building trails. Did you build any trails across the Lotta claim?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

(Testimony of Angus Mackey.)

Q. Where are these trails leading to—from what place to what place—that you were building across the Lotta claim?

Same objection. Objection overruled. Defendant allowed an exception.

A. Leading from the boarding-house, the old Ebner boarding-house, to the two tunnels on the Parish claim that we were working on.

Q. Parish #2? A. Parish #2.

Q. Did you ever measure up the work that was done on the lower tunnel on the Parish #2?

A. No, I did not; I was busy at that time and left that to the surveyor.

Q. You never measured up the work done on the upper tunnel?

A. No, the surveyor done both of them.

Q. You said something about your intention to hold possession of the Lotta patented claim. I will ask you if you were doing the best you could also to hold possession of the Parish [471] #2?

Objected to as leading. Objection sustained.

Q. I will ask you if aside from the real assessment work, in the prosecution of other work on the Parish #2, whether or not you were keeping men on there for any other purpose, during the summer of 1910—on the Parish #2?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial and after the time the plaintiffs in this case are committed to in the entry, not only in the complaint in 803 but in the original complaint in this suit.

(Testimony of Angus Mackey.)

By the COURT.—It is preliminary. Objection overruled. Defendant allowed an exception.

A. No, I don't think so.

Q. Well, do you know at that time whether or not the opposing company was trying to get possession of any part of the Parish #2? A. Yes, they were.

Q. Were you making any efforts to keep them off of there?

A. Yes, we were making efforts to keep them off.

Q. Now, where did these people first commence their work—that is, when I refer to these people I mean the agents and representatives of the defendant company—where on the property that is in controversy did they first commence doing any work that indicated they were coming on the property for any purpose?

A. I believe down near Snowslide Gulch.

Q. How far away, approximately, is that from their dam that they ultimately constructed in Gold Creek—approximately how far?

A. Approximately, I should judge, 800 or a thousand feet.

Q. When did they make their first appearance upon the upper side line of the Parish #2 and on the Lotta claim, to your [472] knowledge? When did you first find out that they were getting in there?

Objected to—

By the COURT.—When did you come here first?

A. I think about the 10th of August,—I think it was—I can't remember just exactly. I think about the 5th to the 10th of August.

(Testimony of Angus Mackey.)

Q. You say after you came here first, you remained a while and went away and came back again?

A. Yes, sir.

Q. You remember approximately how long you remained on the first trip up?

A. I think between two and three weeks.

Q. And then you went away and remained until about what time? A. Some time in September.

Q. Now, I will ask you when you knew that these officers and agents of the defendant company were making any effort to come up on the Lotta claim and the upper part of the Parish #2?

Mr. HELLENTHAL.—We object to that. Let him state what he saw.

Objection overruled. Defendant allowed an exception.

A. It was the latter part of September, to my best knowledge.

Q. In the construction of their flume up there—I will ask you when they commenced to construct a flume down Snowslide Gulch, some six or eight hundred feet away from where the dam was ultimately put in—I will ask you if they continued constructing the flume from Snowslide Gulch on up to the intake right along on a line, or did they construct it some other different way from there?

A. They were working on the lower end first and then they afterwards [473] the latter end of the month, started in at the upper end.

Q. And that is when the row took place?

A. Yes, sir.

(Testimony of Angus Mackey.)

Q. So they were building the flume from both ends?

A. They were building the flume from both ends, when they arrested me.

Q. You don't know anything about the assessment work that was done on any one of those Parish claims prior to 1910?

(Question withdrawn.)

Q. Did you have anything to do with any assessment work at all on either one of those Parish claims prior to 1910? A. Nothing.

Q. Did you ever make a personal examination to see what had been done? A. On the Parish?

Q. On the Parish claims.

A. No, I did not. I went down to the tunnel, that is all, the tunnel down at the creek.

Q. You didn't go over the claim to ascertain the amount or kind of assessment work that had been done? A. No, I did not.

Q. Now, I will ask you if you were not advised by your attorney that it was good to stay upon that claim there while the opposing parties were attempting to get upon it, to stay there, in the absolute possession of it—were you not advised to that effect?

Objected to as leading. Objection sustained.

Q. What other advice, if any, were you given by your counsel with respect to this Parish claim, other than you have already [474] related, if anything?

Objected to as incompetent, irrelevant and immaterial.

(Testimony of Angus Mackey.)

Objection overruled. Defendant allowed an exception.

A. You mean the Parish & Lotta?

Q. Yes.

A. In the work we were doing up there to be careful and not have any of the opposing parties hurt, which we didn't propose to do, anyhow—we didn't calculate to hurt anybody up there.

Q. What, if anything, were you advised by your attorneys as to the necessity of keeping some parties on the ground all the time?

Objected to as leading. Objection sustained.

Q. Was there any other advice given you by counsel about keeping up your work on these two claims?

Objected to as leading. Objection sustained.

Judge WINN.—That is all.

(By Mr. SHACKLEFORD.)

Q. Where did you first meet Mr. Underwood?

A. In New York.

Q. At his office?

A. I couldn't state whether it was in his office or not.

Q. You have been to his office? A. Yes, sir.

Q. Do you know what is on that door?

A. Well, I can't remember now—there are the names of several companies on the door.

Q. The company's name is on the door?

A. Yes, sir.

Q. The California & Nevada Copper Company?

[475]

A. Several companies' names are on, if I recollect

(Testimony of Angus Mackey.)

—I wouldn't be positive, you know.

Q. You knew when you were dealing with him that you were not dealing with him personally—you were dealing with him as representing the California & Nevada Copper Company—you have known that all the time?

A. I knew that I was dealing with a company and he was at the head of one.

Q. And that you were not dealing with Underwood as a person, but dealing with him as representing a company?

A. I knew that he was at the head of a company.

Q. And that the dealings you and he were having were concerning the business and for that company, didn't you?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. plaintiff allowed as exception.

A. Why, yes, certainly—I understood he was the head of a company.

Q. And that is what your dealings were about—he was dealing with you in behalf of that company—didn't you know that?

A. Well, yes; the first dealings I had with him was to build a mill in Alaska.

Q. For him or the California & Nevada Copper Company?

A. No, it was not mentioned. It was simply his own name.

Q. But before you left there to come up here and build this mill, you knew you were coming up here

(Testimony of Angus Mackey.)

to build it for the California & Nevada Copper Company and not for Mr. Underwood, didn't you?

A. I knew that Mr. Underwood was at the head of it, yes—if that is what you are trying to get at.

Q. You knew that Mr. Underwood was dealing with you as a representative [476] of the company and not personally, did you not?

Objected to as incompetent, irrelevant and immaterial.

By the COURT.—You understand the question—whether in your dealings with him you were dealing with him personally, on his own account, or whether you were dealing with him as the representative of this company?

A. I was dealing with him as the representative of the company, I suppose.

Q. Now, you say you put these men on the Lotta lode to construct trails?

Objected to as misleading.

Q. You put them on there for the purpose originally of building trails across the Lotta?

A. Started to build trails there; yes, sir.

Q. Now, I will ask you if you did not testify in the preliminary hearing in Case #823-A, being the case of the Alaska-Juneau Gold Mng. Co. vs. The Ebner Gold Mg. Co. as follows—I will change that question. I will ask you if you did not testify in the case of the United States versus Mackey in the Commissioner's Court as follows: "Q. I think you told us about that part of it—was that the only purpose for which you put the men to rolling rocks. A. Certainly. Q. Did

(Testimony of Angus Mackey.)

you keep them there for any other purpose? A. To protect the rights of our people. Q. For any other purpose? As I said they might be used for this work later on but etc." Did you so testify?

Judge WINN.—I object to the question. The question is unintelligible.

By the COURT.—He may answer and then make any explanation he cares to. [477]

A. To the best of my knowledge and belief I think I testified it was also to be used for cutting trails as well.

Q. That is in connection with the answer?

A. Yes, sir.

Q. Afterwards?

A. That is the way I think I testified.

Q. I call your attention particularly to this last answer. As I said, they might be used for this work later on. Now, I understand you, your recollection is that you added to that for the purpose of cutting trails?

A. Yes, sir; I think that is what I testified to.

Q. As a matter of fact, you know before you left Juneau on your trip south-bound that the Alaska-Juneau people had gone up there and taken possession of this,—posted their notice and taken possession of this property, with the intention of building a water right on the creek? A. Not at that time.

Q. How soon did you know it—you knew it before you got to Seattle? A. No, I did not.

Q. Did you go down with Mr. Bent?

A. Yes, but my understanding was it was on a dif-

(Testimony of Angus Mackey.)

ferent claim—*those* claim, the Auk Chief or some claim there.

Q. But you knew they had gone up there?

A. Yes; I knew they were trying to jump certain ground up there—that was my understanding.

Q. And you knew that Harry was up there, while you were in Seattle, didn't you?

A. No, I didn't know that.

Q. Didn't you have some conversation in Seattle with somebody about Harry? [478]

A. I don't think it.

Q. Didn't you testify on your examination in the case of the United States against Mackey as follows:

“Q. You testified that you heard a great deal of one O. M. Harry—you state you had heard about him in Seattle. Who told you? A. I don't know.

Q. You don't know? A. I couldn't say.” Now, I ask you if you didn't give that testimony on the hearing? A. I don't recollect that.

Q. Haven't you any recollection of it at all?

A. No, I don't recollect about that.

Q. You have no recollection of having discussed Harry with somebody in Seattle?

A. I may have—yes, I wouldn't say I have not.

Q. If you might have, who was it you might have had it with?

A. I don't know; probably some people from up here. The question might come up with some of my acquaintances that came down aboard the boat and we might have met and told me some of those things

(Testimony of Angus Mackey.)

that were happening up here—it might have been so.

Q. The surveyors that were surveying the Parish #2 and the Parish #1 lode claims for patent, who you say advised you to do some more work on the Parish lode—who were they?

A. Hill and Wettrick.

Q. Do you remember which one of them it was?

A. Well, I think probably I might have spoken to both of them in their office.

(Recess for ten minutes.)

(By Judge WINN.)

Q. During the recess you looked over this paper that Mr. Shackleford [479] presented to you, which purports to be some extracts from your testimony in the lower court upon the preliminary hearing—just preceding the questions that Mr. Shackleford asked you—will ask you if you remember substantially these questions being put to you by the district attorney—

Mr. HELLENTHAL.—We object to that as a self-serving declaration, unless it is an explanation of what he said subsequently.

Objection overruled. Defendant allowed an exception.

Q. I will read this. “The District Attorney: I want to get the names of those parties who were working there Monday afternoon under Al Black and I think I am entitled to find out. The Court: I think witness may answer; I think you may proceed with the cross-examination in the same manner. The District Attorney: You state that these men were put to work partly to drive Kenzie and his men from their

(Testimony of Angus Mackey.)

work below and partly from other purposes. Now what were those other purposes, besides rolling rocks down the hill in the Gulch? A. Is there any law to compel people not to work their own mining property? Q. Just answer my question. A. I would like to know. Q. Now, what was that work you spoke about? A. Well, we were protecting the rights to our property.” I will ask you if you testified concerning the matters I have asked you about, substantially as there indicated—did you testify something concerning that?

A. I believe I did.

Q. And substantially as testified there?

A. Yes, sir.

Judge WINN.—That is all. [480]

(By Mr. SHACKLEFORD.)

Q. What were you paying these men a day?

A. Which men.

Q. The laborers?

A. The men I had working up there?

Q. Yes.

A. From three to four dollars a day.

Q. From three to four? A. Yes, sir.

Q. They varied?

A. They varied, yes, according to the men.

(By Judge WINN.)

Q. What distinction did you make in them between three and four—what men did you pay four and what men three?

A. I paid the men working on the Parish claim, those I paid four dollars to.

(Testimony of Angus Mackey.)

Q. That was hard rock work?

A. Working in that tunnel,—yes.

Witness excused.

Judge WINN.—I will call Al Graham. [481]

[Testimony of Al Graham, for Plaintiff.]

AL. GRAHAM, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Your name is Al Graham? A. Yes, sir.

Q. How long have you been in and about Juneau?

A. Eight or nine years.

Q. What has been your business principally?

A. Mining.

Q. You know Mr. Mackey? A. Yes, sir.

Q. You know Al Black? A. Yes, sir.

Q. You know Ed Seitz? A. Yes, sir.

Q. And Hunsucker? A. Yes, sir.

Q. Did you ever do any work for Mr. Mackey in 1910? A. Yes.

Q. Upon what is known as the Ebner property?

A. Yes.

Q. When did you first go to work up there?

A. The 19th day of September.

Q. What work were you put at up there?

A. Driving a tunnel.

Q. You have heard Mr. Mackey's testimony here in court, have you not, to-day? A. Yes, sir.

Q. And you heard him refer to Al Graham doing certain work up there—you are the same Al Graham

(Testimony of Al Graham.)

he referred to? A. Yes, sir. [482]

Q. Now, I will ask you when you were up there, if you became acquainted with a line that is brushed out from an old cabin on the right-hand side of the creek as you go up the creek, down towards the creek?

A. Yes, it was pointed out to me—that was the boundary line; that is all I know.

Q. When you went to work on the tunnel, where the tunnel with reference to that line brushed out across the creek?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial, and not competent to prove any title in the case, for the reason that the uncontradicted testimony shows the controversy arose over the property known as the Parish #2 lode in the month of August, 1910.

Objection overruled. Defendant allowed an exception.

A. It was down the creek.

Q. From that brushed-out line? A. Yes, sir.

Q. Is that the same tunnel that Mr. Mackey was testifying about in court that he put you to work on?

Objected to as calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. It was on the Parish #2.

Q. On what is called the Parish #2?

A. Yes, sir.

Q. As to the boundaries, etc., of that property up there, you never made any particular investigation?

(Testimony of Al Graham.)

A. No, I did not.

Q. Did you say you went to work there on the 19th of September? A. Yes, sir.

Q. On that tunnel? [483] A. Yes, sir.

Q. Was there anyone else working with you?

A. Mike McKenna.

Q. How long did you continue to work on this tunnel on this claim after you commenced?

Same objection. Objection overruled. Defendant allowed an exception.

A. I couldn't just tell you the number of days. Somewhere about twenty days, I guess. When I quit there there was still another man there—they didn't quit working.

Q. That was McKenna? A. Yes, sir.

Q. I will ask you if you know Mr. Kennedy, who was in some wise connected with the Alaska-Juneau Gold Mining Company?

A. Yes, I know him when I see him.

Q. While you were working up there on this tunnel during this time, did you see Kennedy—did he come up there at any time?

A. I seen him twice above the tunnel—I seen him talking to Al Black. I brought up some steel and met Mr. Middleton coming down with some powder to blast.

Q. Do you remember what time he was up there talking to Al Black?

A. I think it was about the first of November.

Q. November or October?

A. No, October—October first.

(Testimony of Al Graham.)

Q. It was before the disturbance that took place up there on October third? A. Yes, sir.

Q. Did you hear any part of the conversation that took place between Kennedy and Black? [484]

A. He said to Al Black, "You hollered 'fire,' " and I said, "No, he didn't holler 'fire'; nobody fired anything here," and we were wrangling there, and I got the powder from Middleton and went down into town again. We had to climb a rope there.

Q. Was Middleton there?

A. Yes; he came down with powder and I gave him a load of steel to take to the blacksmith-shop, I had brought up. Mike McKenna and I was to use the powder to blast the holes we had drilled.

Q. Did you use the powder to drive the tunnel?

A. Yes, sir.

Q. On or about the first of October, do you remember approximately how much work you had done on the upper tunnel?

Same objection. Objection overruled. Defendant allowed an exception.

A. There was Ed Seitz and John Carlson working on the open cut there.

Q. From the 19th of September up to this day that Al Black had a conversation with Mr. Kennedy, what work had you been doing?

Same objection. Objection overruled. Defendant excepts.

Q. I ask you what work you had been doing from the time you commenced there on the 19th day of September up to the day that Kennedy was there?

(Testimony of Al Graham.)

A. I was working in the tunnel, hammering in the tunnel, single-jacking.

Q. How many had been helping you?

Same objection. Objection overruled. Defendant allowed an exception.

A. There was Mike McKenna was working with me and Middleton [485] used to take down the steel we needed. It was pretty hard there and we had to have extra steel come down.

Q. Where did you bring the steel down from?

A. From the blacksmith-shop, and he used to help, too.

Q. Where is the blacksmith-shop?

A. Up near the Ebner boarding-house.

Q. Up near the Ebner mill?

A. Yes, sir; just above the Ebner mill.

Q. You have stated now all the conversation you heard between Black and Kennedy?

A. Yes, at that time.

Q. Did Kennedy come back up there any more where you were working on the tunnel after the first—between the first and the third of October?

Same objection. Objection overruled. Defendant allowed an exception.

A. That is the only time I ever seen him.

Q. You were up there on the third of October?

A. In the tunnel? Yes.

Q. What time on the morning of the third did you go down to the tunnel that you have just described?

A. Got down to the tunnel about a quarter past 8,

(Testimony of Al Graham.)

I suppose, about that time—fifteen or twenty to eight.

Q. Had Kennedy and his people put in an appearance at the time you commenced work?

A. No, I hadn't seen anybody around there.

Q. You did know later on, did you not, on the third, about some men coming up there with Kenzie?

A. Yes, sir.

Q. When Kenzie and his men got there, where were you working? [486]

A. I was working on the Parish on the lower tunnel.

Q. Was McKenna there with you? A. Yes, sir.

Mr. SHACKLEFORD.—It is understood all this testimony goes in under our objection.

By the COURT.—Yes, sir, and you are allowed an exception.

Q. Did you see anyone with Kenzie on the third that you afterwards found out to be a Mr. Burch?

A. Yes, I am not acquainted with him—they called him Burch.

Q. Just tell what you saw take place up there on the third of October.

A. They were sliding poles down into the creek there.

Q. Who was?

A. The men. Burch was up on the old flume and Mr. Kenzie was down in the creek on a boulder there and some men were drilling—he was smoking cigars at that time.

Q. Did you see any other men working along on

(Testimony of Al Graham.)

the property just above the tunnel, on the Parish #2 on which you had been working? I mean up the creek.

A. Ed Seitz and John Carlson were working above there.

Q. What were they doing?

A. They were in the open cut and making trails there; they made a short trail. We have to climb up a rope a long way and go up on the old wagon road and they made a trail, cut through there.

Q. Where did that trail lead to?

A. Down to the Parish #2—the one above.

Q. That is down to one of the tunnels on the Parish? A. Both tunnels.

Q. Did you work, while you were working there, on the Parish #2,—did you do any work in the lower tunnel? [487]

A. I worked most of the time in the lower tunnel and a day and a half in the upper tunnel, rock work, mostly blasting.

Q. About what time in the morning did you first see Ed Seitz and Carlson working up there on what you have described to the Court as being a trail?

A. I seen John Carlson right by the penstock as I was going down, and Ed Seitz was mucking down at the upper tunnel, cleaning up an open cut there that morning.

Q. What do you mean by mucking?

A. Mucking in that open cut.

Q. Where is that open cut?

(Testimony of Al Graham.)

A. That is what they call the upper tunnel in the Parish.

Q. He was running an open cut to get into the tunnel?
A. Yes, get under cover.

Q. Did you see anybody on trail work there?

A. John had been working and he said he was going to breakfast—about that time they worked early in the morning and late in the night there, both shifts.

Q. What, if anything, did you see that took place up there in regard to anything—did you see anything take place between Black and Kenzie and Burch?

A. No.

Q. Did you see Kenzie and Burch come up there?

A. Where Black was? No, I see them in the creek.

Q. About how far up the creek was it you saw Kenzie on this rock, from where the tunnel is on the Parish #2?

A. I should say about 200 feet, maybe a little more, maybe not quite that much—something around that, I should judge.

Q. Did you say you did or did not see Kenzie and Burch come up?

A. I didn't see that—they were up there when I went up above where the men were all working.
[488]

Q. They were already up there?

A. Yes, I was in the tunnel and couldn't see them. The upper is so much higher, you couldn't see them unless you were outside.

(Testimony of Al Graham.)

Q. You left the tunnel and went further up the creek, did you?

A. No, Billy Moore was sent down after me, to come up.

Q. He came down to the tunnel after you to come up there where this trail building was taking place?

A. Yes, sir.

Q. And when you got up there you saw Burch and Kenzie, where?

A. I saw Burch on the flume and Mr. Kenzie down in the creek—he was smoking a cigar; a man was drilling there.

Q. When you went up to this place on the Lotta with Billy Moore what were you doing up there?

A. I was blasting up there and cleaned out brush there and making trails and rolling down rocks into the creek.

Q. Did Mr. Kenzie and his people still continue to work down there or did they leave?

A. They worked there, and when we hollered fire, they would get out of the creek.

Q. When you went to fire a blast, did you holler “fire”? A. Always.

Q. And what did Kenzie and his people do when you hollered?

A. They got into that old development flume, behind that.

Q. That is the old flume on the left-hand side of the creek as you go up? A. Yes, sir.

Q. Do you know whether that is referred to as the old Jualpa flume?

(Testimony of Al Graham.)

A. I think that is what they call it.

Q. How long did you continue to work there on the third of [489] October—what time in the day did you quit? A. To go up there?

Q. No, what time did you quit there? You say you were working there.

A. We worked until five—we were working nine hours then.

Q. You quit about five, did you?

A. Just about 5—we quit about a quarter to five, to get out of the place; it is hard to get out of there,—it takes half an hour to get out; we have to use a rope.

Q. Where were Mr. Kenzie and his people when you quit?

A. I think Kenzie and these other gentlemen went to town—I don't know where they went to.

Q. They went away from up there, did they?

A. Yes; that afternoon I didn't work in the tunnel. I worked on the side where the rest of the men were, in the afternoon. I only worked half a shift down in the tunnel a day.

Q. Now, you kept on working for Mr. Mackey up there until what time, after the third?

A. I have been working ever since.

Q. I believe later on, some time on the first or second of November, you were arrested up there with some other people, too?

A. I was arrested on the third of November.

Q. Between the third of October up to the third of November what work were you engaged in?

A. I was foreman up there on the flume and we

(Testimony of Al Graham.)

were working on the Parish, down working on the Parish.

Q. Who did you have working on the Parish up to about the third of November?

A. I was one, I was working myself— November?

Q. Yes, the third of November? [490]

A. Dan Reardon, Mike McKenna and a fellow named Malone was mucking there.

Q. What were those parties doing on the Parish #2 during that period of time?

A. Hammering there,—driving a tunnel there.

Q. Were they working in the lower tunnel on the claim or the upper tunnel?

A. McKenna was working in the lower and Reardon in the upper.

Q. I wish you would state what took place up there on the 2d and third of November, just prior to the time and up to the time you were arrested.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. On the 31st of October—I can't think of that fellow's name—Malone came up to me and said "They are stopping us from throwing the dirt down over the bank from the upper tunnel," and he said, "I wish you would come down," and I said I would be down in a minute, and when I got down there I met Kennedy and I said, "What's the matter here?" And he says, "You can't throw no dirt down here because we have to get this flume along here," and I

(Testimony of Al Graham.)

said, "We have to get the dirt out," and he said, "I don't care a damn if you never get it out," and I said, "We have word to get it out," and he said, "It ain't my fault," and I said, "I am paid to get the dirt out of here and have to get it out," and I came up and told Mr. Wettrick—he was there,—he was in Mackey's place.

Q. Mackey was then in Ketchikan?

A. Mackey was then in Ketchikan, yes, and he was in his place. He said, "I will go down and see about it," and the next morning, on the first of November, I comes down again and took [491] Mr. Lund, the deputy marshal at that time, and I said, "I want you to come down and see if you can't get them to cover their flume up so we can get our dirt out." They wouldn't do it, and the next morning, on the second, Reardon and Malone was arrested and that afternoon they were looking for me and couldn't find me, —I went over the hill and lost a couple of teeth, and the morning of the third, they caught me in Shady Bend and run me to town here.

Q. How long had you been dumping that muck down the hill there prior to the second or third day of November when Kennedy was objecting to your dumping it there?

A. Dumping it down that same place all the time, where we were starting an open cut there.

Q. And I understand he was claiming that interfered with their flume-line they were then building on the right-hand side of the creek as you go up the creek? A. Yes.

(Testimony of Al Graham.)

Q. Had you been dumping there before they built the flume at that point?

A. Yes, before they started the flume at all.

Q. And did you say that you told someone to cover up the flume, so you could keep on dumping?

A. They wouldn't cover—I said, “You had better cover,” and he said, “You cover it,” and I said, “It is your business to cover it up.”

Q. Who did you have that conversation with?

A. Kennedy.

Q. And then do you remember the day they did arrest you? A. On the third of November.

Judge WINN.—That is all. [492]

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. What were your instructions when you went on this ground?

A. I went up there to work in the tunnel.

Q. Did you have any instructions?

A. To drive that tunnel.

Q. Who sent you there?

A. I was told by Mr. Mackey to do the work.

Q. What did he tell you about the other people coming on there? A. Nothing at all.

Q. Not a thing?

A. Not a thing, at that time.

Q. When they got into trouble on the third of October you were called upon to come up the hill to join in? A. Yes, sir.

Q. That was a surprise to you?

A. No; no surprise about it.

(Testimony of Al Graham.)

Q. You expected there was going to be trouble when you went down there to work?

A. No; there was nothing doing at that time—the 19th of September, there was nothing then at all.

Q. You didn't know there was any trouble coming?

A. No, not at that time; nothing around there.

Q. You didn't know there had been a location notice for a water right on that creek? A. No.

Q. Nothing about that? A. No.

Q. When was it you first heard there was going to be trouble up there?

A. I didn't know it until that time when they came after me. [493]

Q. How long had you been working for the California & Nevada Copper Company?

A. The 19th day of September.

Q. Had you been around down here?

A. Yes, sir.

Q. You knew there was a lawsuit up here in the courts over their locating a water right up there when you went up? A. No.

Q. Knew nothing about it? A. No.

Q. Hadn't heard of it? A. No.

Q. Whom were you working for?

A. I was working for Mr. Mackey at that time.

Q. What was the company you were working for?

A. The California & Nevada Copper Company.

Q. You were told to go down in this old tunnel along near the creek on the Parish #2 and drive?

A. Hunsucker showed me where to go.

(Testimony of Al Graham.)

Q. How much work did they propose to do there, did you know? A. No.

Q. How many feet did you drive in that tunnel while you were connected with it?

A. I couldn't say. Mr. Hill could tell you—he measured it.

Q. I mean approximately?

A. I suppose in one tunnel about nine feet.

Q. In the two tunnels?

A. In the two tunnels about eighteen feet.

Q. Right together, are they? How far apart are they? A. Six or seven feet.

Q. And about the 18th of September you got to throwing down [494] dirt?

A. I didn't throw dirt.

Q. Anybody throw dirt?

A. I suppose they were throwing dirt there before the flume came along there at all.

Q. Before they got up that far on the grade?

A. Before they had a grade there.

Q. The work started at the lower end first?

A. Yes; they started to cross at the lower end and they lowered it again.

Q. They lowered the grade at the upper end?

A. At the lower end.

Q. You have been working up there ever since?

A. Yes, sir.

Q. When was it you left the Parish lode and started up there to do the work? You were foreman in charge of the new flume from the Ebner dam around the hillside, were you not? A. Yes.

(Testimony of Al Graham.)

Q. When was it you went up there?

A. After Mr. Mackey went to Ketchikan, a little while after that.

Q. Before you—I will change that—you went back down on the Parish at the time this trouble came up about throwing the dirt down?

A. No; the man that was working there came and told me about the trouble and I went to see what was the matter.

Q. He went to the upper end of the Ebner property and told you to come down?

A. Yes; I was at the flume there.

Q. And Kennedy wanted you to dump your dirt somewhere except on their grade? [495]

A. Yes, there was no place to dump it except down over the bank—there is no place to dump.

Q. So you had to dump it on their grade—there wasn't any other place to do it?

A. I don't know whose grade it was—there was no other place to dump it.

Q. I mean the grade they were making there?

A. Yes.

Q. And then you were brought down here to the courthouse and arrested? A. Yes, sir.

Q. And Wettrick told you to quit dumping the dirt on their grade?

A. No, he didn't tell me anything of the sort.

Q. Did you quit? A. No, I didn't quit.

Q. Did you keep on dumping at the same place?

A. I was arrested and couldn't dump any more.

(Testimony of Al Graham.)

Q. After they got away—they were not kept in jail?

A. No, they didn't dump any more there—no.

Q. Was there a cabin up there when you got up there along the creek that the Alaska-Juneau people were using?

Judge WINN.—I object to that question—that cabin was never built on this claim at all.

Objection overruled. Plaintiff allowed an exception.

Q. There was a cabin there?

A. Yes, in Snowslide Gulch.

Q. That was before you went up there on the 19th of September?

A. Yes, there was a cabin there then.

Q. That is right in the gulch? [496]

A. It is pretty near in the gulch.

Q. It is up the creek from the gulch?

A. It ain't over ten feet, ten or fifteen or twenty feet from the side of the gulch.

Q. Over where Snow Gulch creek comes into Gold creek?

A. It is so close in the creek that they had to leave there—the snow came down by there,—they couldn't live in it.

Q. It wasn't over ten feet from there?

A. I couldn't say exactly. It is pretty close to the creek.

Q. Twenty?

A. Maybe in between ten and twenty. I never measured it off.

(Testimony of Al Graham.)

Q. You started to tell me and I thought you might have some definite idea about it. A. No.

Q. Did you know what they were doing there when you saw that cabin there? A. No.

Q. Nobody told you? A. No.

Q. You went to do the work on the Parish lode in utter ignorance of what was going on?

A. I was working in the tunnel—it is a long ways from there.

Q. You went in in utter ignorance of any proposed tunnel on the part of the Alaska-Juneau?

A. Yes.

Q. You didn't know anything about it?

A. No.

Q. You didn't expect anything? A. No.

Q. You didn't expect any trouble until it came? [497] A. No.

Q. You didn't know that the gang of men that were working there on the Lotta that you went up there to help on the third of October were up there for the purpose of blasting down on anybody, if they came there to finish up that flume-line?

A. There was no flume-line there.

Q. The proposed flume-line?

A. There was no proposed flume-line there at that time.

Q. None at all? A. No.

Q. No notice up in the creek?

A. I don't know about any notice.

Q. You hadn't heard of it?

A. There was nothing there at all; they tried to put

(Testimony of Al Graham.)

a dam across there.

Q. Before that day that they started to put the dam across there, you hadn't heard a thing about any trouble that was coming? A. No.

Q. And when you went up on the hill of the Lotta, when the trouble came, before that time you hadn't any idea or any expectation of any difficulty?

A. No.

Mr. SHACKLEFORD.—That is all.

(By Judge WINN.)

Q. Prior to the time that Mr. Mackey and those people were arrested, which was the third of October, where had those people under Mr. Kenzie or Mr. Kennedy, or any of them, where had they been doing any work, prior to that, up there, in relation to where they were attempting to work on the third [498] of October?

A. Trying to work in the creek on the third of October, what they called a dam; it was further away than it is now—I should say maybe 70 feet, maybe **not that much.**

Q. Had they built any flume—that is, the Kenzie people?

A. Not that I know of—I wouldn't like to say. I don't think there was any flume at that time at all.

Q. There was no flume built there?

A. If there was a flume built, it must have been built below Snowslide Gulch—that is where the two tunnels are.

Q. On that day they made a jump from their work way down on Snowslide Gulch and came up about on

(Testimony of Al Graham.)

the Lotta claim?

Objected to as leading. Objection sustained.

Q. Prior to that time they had been working down near Snowslide Gulch on this flume? A. Yes.

Q. And was that the first you had ever seen Kenzie and his people come up there on the Lotta claim or where they undertook to put the dam in?

A. Yes, I think I saw Kenzie—I wouldn't say for certain—and that other man called—I came out of the tunnel. I know it was Kenzie but I wouldn't be sure of the other man—Burch they called him.

Q. Now, I will ask you if you know of any work that was done by those people under Kenzie on the day or the night that Mackey and those people were arrested—in the first place, when they put in that box, where did they put it in? A. In the creek.

Q. What place?

A. About fifty or sixty feet, maybe a little more, from where the dam is now. [499]

Q. Do you know what time of the day that was done?

A. In the evening between eight and twelve; somewhere between that time.

Q. That would be night?

A. Yes, sometime in the night-time.

Q. Had they the flume built that far up at that time? A. No.

Q. About how far down was it, where they had built any flume at that time, up to that date,—do you remember?

A. I don't think they had built any flume at all.

(Testimony of Al Graham.)

Q. You said something about their changing their grade, the people working under Mr. Kenzie. I wish you would explain to the Court what you mean by that?

A. It was a grade like them steps. One place was too high and they had to lower it down like that other step, that lower tunnel, to compete with their dam. I suppose maybe it was too high. I don't know.

Q. What was their purpose in changing that grade, if you know? A. I suppose to get water.

Q. In the first place, they started to take the water further up the creek? A. Yes.

Q. And then, they came down, further down the creek and eventually built the dam they have there now? A. Yes, sir.

Q. Now, what interference, if any, did you and the people working with you cause with the work Kennedy was carrying on there—in what way was your work interfering with theirs?

A. After we were blasting we were taking our rock out of the tunnel. [500]

Q. Were you doing any other work besides dumping, to interfere with anything Kennedy was trying to do? A. No, that is all.

Q. When the stuff was dumped down that hill, where would it go to?

A. It would go down to the bottom of the creek.

Q. You requested them, I think, to put a board there. Did you know whether or not they had any boards there? A. No.

Q. They didn't put any? A. No.

(Testimony of Al Graham.)

Q. Do you know whether they had any on the ground or not—did you see any? A. No.

(By Mr. SHACKLEFORD.)

Q. On the third of October you say you saw these people up here, putting some logs across the creek?

A. Yes, sir.

Q. To build their dam—when did you first see those logs?

A. I saw some logs up on the sidehill.

Q. When did you first see the logs?

A. I couldn't tell you the exact date.

Q. It was some time before that, wasn't it?

A. Yes, a few days before that.

Q. How many?

A. I couldn't tell you how many.

Q. You couldn't say? A. No.

Q. There was a tunnel started down Gold Creek here on the Parish claim before you went up there, wasn't there, by the Alaska-Juneau people? [501]

A. I don't know whether it was started then or not. I couldn't say. It might be started a year before that.

Q. It was there when you went up?

A. There was a tunnel there, yes—I don't know how far it was in. I was never over it until later on.

Q. That is the tunnel just above the present right of way of the flume-site?

A. It is around Snowslide Gulch—

Q. I mean that tunnel is above the place where the present tunnel for a flume-line goes into Snowslide Gulch, a few feet above?

(Testimony of Al Graham.)

A. There is two tunnels there; there is one on the same grade as that flume and one above that.

Q. The one above it was there when you went up there?

A. I don't know about that. There was a tunnel there. I don't know how far it was in.

Q. It was one of those two tunnels?

A. There was somebody working there—

Q. On the 19th of September? A. Yes, sir.

Q. When you went up there? A. Yes, sir.

Q. But you don't know whether that is on the Parish or one of the other claims?

A. No, I don't know where the stakes are.

Q. (By Judge WINN.) You don't know what claim that cabin was on Mr. Shackelford questioned you about? A. No.

Witness excused. [502]

[Testimony of William Middleton, for Plaintiff.]

WILLIAM MIDDLETON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. When did you come to Juneau?

A. On July 28, 1910.

Q. Have you ever done any work up on what has been referred to all the way through this case as the Ebner property? A. Yes.

Q. When did you first go to work there?

A. On September 13th.

Q. September 13, 1910?

A. September 13, 1910.

(Testimony of William Middleton.)

Q. Where did you commence work up there at that time?

A. It was up near the intake, on the flume grade.

Q. That is the high line flume? A. Yes, sir.

Q. On the left-hand side of the creek as you went up? A. Yes, sir.

Q. Do you know where there is a brushed-out line across the creek, commencing at a little cabin on the right-hand side of Gold Creek as you go up the creek—do you know where there is a little old cabin?

A. Yes.

Q. Now, I will ask you if you have ever observed a brushed-out line there that runs from the neighborhood of that old cabin down toward the creek?

A. Yes, I have.

Q. Did you ever do any work toward brushing that out, yourself? A. No.

Q. Now, I will ask you if you know Mr. Kenzie.

A. Yes. [503]

Q. Did you ever see the man that you afterwards found out to be Burch? A. I have.

Q. And have you ever seen Mr. Kennedy, who was assistant superintendent under Mr. Kenzie?

A. No, I don't believe I ever have.

Q. I will ask you if you know where the air-compressor is up there on the Ebner property?

A. Yes, I know where it is.

Q. I will ask you if you ever saw any people up there representing Mr. Kenzie's people at work, on or about any portion of what was called the Parish #2 claim and in or about where this line is cleared

(Testimony of William Middleton.)

out across the creek at the old cabin you have testified concerning? A. Yes, I have.

Q. When did you first see anyone up there?

A. It was about the last week in September.

Q. Where did you see them up there?

A. Why, I saw them—it was above the lower tunnel there—I saw them putting through the flume grade.

Q. Putting through a flume grade?

A. Yes, sir.

Q. Below the lower tunnel on what is known as the Parish #2 claim?

A. No, it was above the lower tunnel.

Q. Do you mean up above it on the bank or up above it on the creek? A. It was on the bank.

Q. And where was it with reference to this lower tunnel on the Parish—up or down the creek? [504]

A. It was—

Q. Or was it just up over the tunnel?

A. It was just over the tunnel.

Q. That was down on what you supposed to be the Parish #2? A. Yes, the Parish #2.

Q. Did you ever see them up about this line you say was brushed out across the creek from the old cabin and in and about or near the air-compressor of the Ebner property—did you ever see any of them up there? A. No, I never have.

Q. On the 26th or 28th of September or the first or third of October, did you see any people up there of Mr. Kenzie's? A. Yes, on September 28th.

Q. What took place up there to your knowledge

(Testimony of William Middleton.)

and what did you see?

A. Well, I was sent down there by Al Black to blast in case any of Kenzie's men rolled any rocks down toward the creek, and I went down, and as soon as they did, I set a blast off and shortly after that Kenzie and Burch came up and asked who fired that shot, and Al Black came down just about that time and said "Middleton," and pointed to me, and Kenzie asked me why I fired that shot without giving them warning and I said I did give warning.

Q. Did you? A. I did.

Q. What did you do in the way of giving them warning? A. I yelled "fire."

Q. What other conversation that you heard took place between Black and Kenzie at that time?

A. Black said, "I am the one to see about that because I told [505] him to set this blast off," and Kenzie said, "You are too old a hand at that, Al; you ought to know better," and Al said, "Well, you had better see Mackey about that; he is the one that is giving me orders," and he sent me up to the old blacksmith-shop then, and that is all the conversation I heard.

Q. Do you know anything about a road that leads from the regular Basin road, which runs on the left-hand side of Gold Creek going up—any road leading from that main road down to the air-compressor on the Ebner property? A. Yes.

Q. Did you ever see any notice posted up there?

A. I have.

Q. Do you remember about what time that notice

(Testimony of William Middleton.)

was posted up?

A. It was prior to the 28th of September.

Q. Did you see what that notice contained, substantially—did you read it? A. Yes.

Q. What did it state?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. It was a warning for anyone to keep off the property there—not to trespass upon the property.

Q. Did you ever see any fence put up across that road? A. Yes.

Q. When was that put up, approximately?

A. That was prior to the 28th of September.

Q. Were you up there on the third of October working in and about this place or were you on the high line flume?

A. I was up on the high line flume. [506]

Q. And you didn't go down to where that rumpus took place on the third of October? A. No.

Q. I don't believe you know anything about what took place at the time that Al Graham was arrested and some other people there, Wettrick and some of them—you were not down there at that time?

A. No; I was not down there.

Q. Where were you working then?

A. I was over near the flume grade.

Q. Who was this man Hunsucker they speak of—what was he doing, what was his business?

A. He was watchman.

(Testimony of William Middleton.)

Q. Of what property?

A. Of the Ebner mine.

(By Mr. SHACKLEFORD.)

Q. When did you first go on the property?

A. I went on the last week in July—not to start work, though.

Q. Were you here when the injunction suit was tried, about the first of September? A. No.

Q. Were you in town? A. No, sir.

Q. Were you up at the mine? A. No.

Q. Were you out of the city? A. In Seattle.

Q. You went below and then came back?

A. Yes, sir.

Q. When did you get back?

A. I got back here about the 11th of September.

[507]

Q. Then, what did you start to do?

A. I started to work on the 13th of September.

Q. What were you assigned to do at that time?

A. I was assigned to work on the flume grade there, carrying stulls and pick and shovel work.

Q. When did you first hear any conversation or gain any information about the proposed building of a flume from somewhere in the vicinity of the Lotta lode down the creek by the Alaska-Juneau?

A. As soon as I arrived in town—the first week in September.

Q. What was the cause of putting in a gate and notice across this roadway that connects the Basin wagon road with the compressor plant?

A. Why, the cause was there was some lumber

(Testimony of William Middleton.)

brought up there by the Treadwell people.

Q. The Alaska-Juneau people? A. Yes.

Q. And it was taken down that roadway and landed?

A. No, it was not taken down; it was put on the road there.

Q. When were the logs put down there that they made the dam with afterwards?

A. That was about October first.

Q. They were handling the logs on the 28th?

A. They put the logs on the road and they started to slide them down about the 28th of September, I should say.

Q. Did you notice a tunnel near the boundary of the Parish #2 and the Taku Queen, when you went up there in September?

A. I don't remember now.

Q. Did you notice a new cabin down there?

A. Yes, I noticed a cabin.

Q. I presume you noticed very shortly after that they were [508] driving a tunnel? A. Yes, sir.

Q. Then, a day or two after you got up there?

A. It was shortly after; yes.

(By Judge WINN.)

Q. This lumber that you say was put up there prior to the 28th of September, was put on the road-side,—do you mean the regular wagon road that goes up the Basin from Juneau? A. Yes.

Q. And they didn't commence sliding it down the hill until what date?

(Testimony of William Middleton.)

A. I saw them sliding it down about the 28th of September.

Q. I believe you said that notice up there was posted prior to the 28th? A. Prior to the 28th.

(By Mr. HELLENTHAL.)

Q. How long prior?

A. I should say it was about two or three days.

Q. That is the time the gate was built?

A. Yes, about the same time.

Q. It was about the 26th of September the gate was built?

A. Well, I should say it was about the 26th.

(By Mr. SHACKLEFORD.)

Q. You knew there was a water notice up there where they started to build their dam from—a location notice? A. No, I didn't know.

Q. How did you locate your gang here just above them on the Lotta lode on the 28th of September—how was that gang located on the Lotta unless they knew from the water notice [509] that the dam was going to be put in about that place?

Judge WINN.—We object to that as calling for a conclusion of the witness.

Objection overruled. Plaintiff allowed an exception.

Q. By your men I mean the California & Nevada Copper Company men?

A. Were put to work where?

Q. Just above the place where the other people came to start their dam,—you all knew, you knew yourself about where that dam was going to be put

(Testimony of William Middleton.)

in, before it was put in?

A. No, I didn't know that.

Q. You didn't know that? A. No.

Q. As soon as they found out that they were there working on the dam, Al Black sent you down to fire the shot?

A. He sent me down September 28th,—that was before they put in the dam.

Q. They had been working there?

A. They were sliding lumber down the hill—they hadn't begun the building of the flume yet.

Q. What instructions did Black give you?

A. He told me if they brought any lumber down, if they came anywhere near the creek, to scare them off after giving them warning.

Q. After giving them warning? A. Yes, sir.

(By Judge WINN.)

Q. You heard the testimony of Al Graham.

A. Yes, sir.

Q. Are you the same Middleton he referred to about bringing steel down to some place where he was working on the tunnel? [510] A. Yes.

Q. Where was Al Graham when you carried steel down there?

A. He was working in the lower tunnel.

Q. On what you supposed to be the Parish #2 claim? A. Parish #2.

Q. Do you know of the building of any trails, working on any trail over on the Lotta claim, in order to get down to this tunnel where Al Graham was working?

(Testimony of William Middleton.)

A. Yes; I saw Ed Seitz putting in a trail through there.

Q. What time was Ed Seitz working on that trail?

A. It was about the last of September. The exact date I don't remember.

(By Mr. SHACKLEFORD.)

Q. Whom were you working for up there?

A. I was working for Mackey.

Q. You know you were working for the California & Nevada Copper Company, don't you?

A. Yes.

Q. When Kenzie went up there with Burch, who was with them—do you know?

A. They were alone that day.

Witness excused.

Whereupon court adjourned until to-morrow, June 1, 1911, at 10 A. M. [511]

June 1, 1911—10 A. M.

[Testimony of Mike McKenna, for Plaintiff.]

MIKE McKENNA, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What business do you follow; what sort of labor principally? A. Prospecting and mining.

Q. You know where the Ebner group of mines are up Gold Creek, near Juneau? A. Yes, sir.

Q. In the summer of 1910 did you do any work up there, under Mackey? A. Yes.

Q. You didn't do any work under Tripp up there, did you? A. No.

(Testimony of Mike McKenna.)

Q. What time in the summer of 1910 did you commence work up there under Mackey?

A. I believe it was on the 15th of September.

Q. Where on that property did you commence work and what were you doing?

A. I started to work on the tunnel on the Parish #2 claim.

Q. You have heard some of the testimony here in court yesterday—you heard some of the witnesses testifying?

A. A very little; it was late when I got here yesterday.

Q. Do you know whether or not on this Parish #2 claim there are now two tunnels put in by Mr. Mackey—one is called the lower and one the upper tunnel? A. Yes.

Q. Which one of those tunnels did you work on?

A. The lower tunnel. [512]

Q. You commenced there about what day working in that tunnel?

A. I believe it was the 15th of September.

Mr. SHACKLEFORD.—I object, for the reason that it appears from the pleadings in this case that ouster is alleged to have occurred in the month of August.

Objection overruled. Defendant allowed an exception.

Q. You commenced there about what date and then continued to work until what date?

A. I think it was the 15th of September.

Q. The 15th of September and worked up to what

(Testimony of Mike McKenna.)

time? A. The 16th of October.

Q. What were you doing in the tunnel—driving a tunnel? A. Yes, sir, driving a tunnel.

Q. Was there anybody working there with you during this time?

A. Yes, there was several working with me from time to time.

Q. Do you remember the names of some of them?

A. Al Graham; Wm. Middleton worked a great deal there; Dan Reardon worked some there, and Wm. Moore was in there—I forget whether he worked much or not. And Ed Seitz worked there some.

Q. Now, do you know where there is a brushed-out line up there on that property that runs from a little old cabin on the right-hand side of the creek as you go up and the line is brushed out down the creek and over across the creek—you know where that line is? A. Yes; where that old cabin is?

Q. Yes. A. Yes.

Q. Now, I will ask you while you were working on this lower tunnel between the dates that you have testified concerning, as to whether or not you saw anybody working up about where this line is cleared out and also up above it on the creek [513] that is, I mean a little further up the creek?

Mr. SHACKLEFORD.—Same objection to all this testimony.

Objection overruled. Defendant allowed an exception.

Q. Did you see anybody working there, that is,

(Testimony of Mike McKenna.)

any people that were working under Mr. Mackey?

A. Yes.

Q. Who did you see working there?

A. I saw John Carlson, Ed Seitz, Al Graham, Wm. Moore, Dan Reardon and several others.

Q. What were they doing when you saw them working there?

A. Some of them were starting to face up a tunnel and some were building trails, and the like.

Q. Where would that trail lead to, from what point to what point, that they were building?

A. The new trail?

Q. Yes.

A. It was to be a short trail to the lower workings of the Ebner mine,—the Ebner mill.

Q. When you say the lower workings, you mean the workings on the Parish #2?

A. No, I mean the mill working at the old Ebner camp.

Q. You mean it would be the old workings of Mr. Ebner near the road, down to what place?

A. Down to where I worked.

Q. Down to where you worked on what claim?

A. On the Parish #2.

Q. Do you remember about how often you saw these people working on that trail during the time you were working on the lower tunnel?

A. They were working there the most of the time I was there.

Q. Do you remember seeing any of them there on the third day [514] of October, 1910? A. Yes.

(Testimony of Mike McKenna.)

Q. Where were you working on the third day of October, 1910?

A. On that tunnel on the Parish #2 down on the back of the creek.

Q. What time did you go to work down there on the third in the tunnel?

A. The mining work between 7 and 8 o'clock, I think.

Q. Where were you boarding at that time?

A. At the Circle City Hotel.

Q. Then, you went to work from the Circle City Hotel?

A. Yes; went up to the old camp and got my steel and came down the trail to work every morning.

Q. Was Kenzie or any of his people up there on the property on the morning of the third when you went to work? A. No.

Q. Did you see anything that took place up there on the morning of the third between morning and noon or in the afternoon? A. Yes.

Q. What did you see?

A. I came out for steel and I saw a man up the creek and heard men blasting up on the sidehill, hollering "fire," and those men in the creek were putting in a dam there, trying to put in a dam.

Q. Did they have any part of the piece of flume constructed at that time, the men down on the creek?

A. No, I think not, not before that,—no, I think not.

Q. You know Mr. Kenzie? A. Yes, sir. [515]

Q. Did you see him up there that day or were you

(Testimony of Mike McKenna.)

close enough to recognize him?

A. Yes, I saw him up there.

Q. Well, when these people on the sidehill fired—I mean blasted and hollered “fire”—what did these people down the creek that were with Kenzie do?

A. They went away to a safe place somewhere—got in safety.

Q. Do you know whether or not Kenzie’s people did any blasting down there on the creek that day?

A. I believe they did.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. You are quite certain of the date you went up there? A. Yes, I believe it was the 15th.

Q. Where did you get that date from?

A. From memory.

Q. You didn’t keep any account or anything?

A. No, only memory.

Q. Your books of the company will show when they commenced? A. I didn’t see the books at all.

Q. I say they would show? A. I suppose so.

Q. You were paid all right—for the right time?

A. Oh, yes.

Q. Now, when you went up there, as you passed Snowslide Gulch on the way up, you noticed a new cabin there, didn’t you?

A. Yes, I believe there was a cabin there.

Q. And there was work that had been done in the tunnel, a little distance above the cabin and up the creek at that time, hadn’t there? [516]

A. I think they were starting a tunnel there.

(Testimony of Mike McKenna.)

Q. I am speaking of the Alaska-Juneau?

A. Yes, I know.

(By Judge WINN.)

Q. Do you know who lived in that little cabin that was built down the creek there—do you know a man by the name of O. M. Harry?

A. Yes, I saw him there; yes.

Q. A man that walked lame?

A. Yes; I see him there.

Q. How long did this man, O. M. Harry, to your knowledge—I mean how long do you know that O. M. Harry stayed there in that cabin that was built, that Mr. Shackelford questioned you about?

A. I don't know; I was working for the Bear Harbor mine before I came up here to work and how long he was there I can't say. I was not here.

Q. You don't know what mining claim that cabin was built on,—you never ran out the lines to find out what mining claim that cabin was built on?

A. No, I never ran out any lines; no.

(By Mr. SHACKLEFORD.)

Q. You people worked there in the daytime?

A. Yes, sir.

Q. At night you all went up to the upper end of the Ebner property to the bunk-house up there?

A. No, I never went up—I came right down to town.

Q. The men that were employed there either went to town or went to the bunk-house on the upper end of the Ebner property? A. Yes. [517]

(Testimony of Mike McKenna.)

Q. None of them stayed on the Parish claim at night?

A. I think they were working a night shift on it a while; yes.

Q. While you were there?

A. While I was there.

Q. That was after the third of October?

A. About that time, some time.

Q. It was after this trouble arose?

A. Yes, I know they were working on the night shift there for a while, but I didn't work night shift.

Q. Who was on that night shift?

A. Either Seitz or this Carlson.

Q. Whenever a man was through his work, why he didn't stay on the claim—you had no cabin on the claim? A. I don't know where he stayed.

Q. There was no place to stay and sleep on the Parish claim?

A. He could stay all night and work if he wanted to.

Q. When you were through your work?

A. There was an old cabin up there, I think.

Q. That was occupied, I suppose?

A. I don't know.

Q. As a matter of fact, you know that the men that worked there didn't sleep on the claim, don't you? A. I suppose not.

(By Mr. SHACKLEFORD.)

Q. That is the old cabin on the Lotta, the old cabin up on this bench here, near the corner of the Lotta and the Parish. That is the cabin you are talking

(Testimony of Mike McKenna.)

about? A. I think so.

Q. That is an old cabin?

A. That is an old cabin.

Q. It is not in a state of repair?

A. No, it is not.

Witness excused. [518]

[Testimony of Dan Reardon, for Plaintiff.]

DAN REARDON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your name? A. Dan Reardon.

Q. What is your business, generally?

A. Prospecting, mining.

Q. How long have you lived in southeastern Alaska? A. About five years.

Q. Do you know the property that is referred to as the Ebner property up Gold Creek from Juneau?

A. Yes, sir.

Q. Did you ever do any work up there?

A. Yes.

Q. Was that in 1910? A. Yes, sir.

Q. You were working under Mackey?

A. Yes, sir.

Q. About what time did you go to work up there?

A. I went to work on October first.

Q. On October first? A. Yes, sir.

Q. Where did you go to work on the property?

A. Grading on the flume right opposite the Ebner mill, on the left-hand side of the road as you go north.

(Testimony of Dan Reardon.)

Q. You first went to work on the first day of October on the high line flume Mackey was building?

A. Yes, sir.

Q. Did you ever do any work any other place on the property besides on this high line flume? [519]

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial—the statements in the pleadings and the admissions of the parties being such as to prevent proof after the date the witness was employed, and all the other questions come in under this objection.

Objection overruled. Exception allowed.

Q. What other places did you work besides on the high line flume?

A. I drove a tunnel on the Parish #2.

Q. When did you commence work on that?

A. Why, I couldn't say just exactly the date—it must be along the ninth or tenth of October.

Q. Who were you working with, if anyone?

A. Maloney was the man that was helping me.

Q. You were working on what is called the lower or upper tunnel on the Parish #2?

A. The upper tunnel.

By the COURT.—The upper tunnel—does that mean up the creek or up the bank?

A. It is about probably 100 feet above the lower tunnel.

By the COURT.—Up the bank?

A. Yes, up the bank.

Q. Is it any further up the creek than the lower tunnel, or is it just over it, do you remember?

(Testimony of Dan Reardon.)

A. It is a little diagonal.

Q. Where were you working on the third day of October?

A. I think I was—well, I worked some on the grade where this flume was and then I worked the balance of the time on what they call the Lotta patented claim.

Q. You are the same Dan Reardon that Mr. Black referred to in [520] his testimony, as having gone over and gotten you and some others that morning and put them to work there on the Lotta?

A. Yes.

Q. What time did you go to work there on the Lotta that day?

A. Why, it must be half-past nine o'clock or ten.

Q. Do you know Mr. Kenzie, the superintendent of the Treadwell and the superintendent of the Alaska-Juneau?

A. Yes, sir, I have seen him.

Q. Did you see him up there that day?

A. Yes, sir.

Q. Did you see a man up there that you afterwards found out to be a man by the name of Burch?

A. Yes, sir.

Q. With Kenzie? A. Yes.

Q. What were they doing up there that day?

A. Kenzie was down on Gold Creek on top of a big boulder and another man sitting by the side of him using a single jack driving a hole in the rock.

Q. Did Kenzie's people do any blasting down there while you were over on the Lotta?

(Testimony of Dan Reardon.)

A. Two shots, I think, two blasts.

Q. They fired two blasts? A. Yes.

Q. Did they sing out and give you people warning when they fired their blasts?

A. Yes, I heard them holler up that they wanted to fire two blasts down below.

Q. Now, were the people you were with firing some blasts up above them on the hillside?

A. Yes, sir. [521]

Q. How about you people giving warning when you fired blasts?

A. They always gave warning, every time.

Q. Did you see what the people under Kennie did when you people gave the alarm of firing blasts?

A. Well, part of the time I could see them and part of the time I didn't see them.

Q. What would they do—get out of the way or stay in the same place?

A. They generally got out of the way; yes.

Q. How long were you working there on the third?

A. That day of the third I worked until about five o'clock, I think.

Q. What became of Kennie's people?

A. Well, they were trying to put in a dam down there but they couldn't very well do it, and along in the afternoon there was four or five men on the other side of the creek pulling a few poles down there—they didn't do any more work down in the bed of the creek until late along in the evening.

Q. They were over there pulling down some poles from the big wagon road? A. Yes, sir.

(Testimony of Dan Reardon.)

Q. That was on the third day of October. Do you remember the next day, what work you did? Did you remain working on the Lotta or go back to the tunnel or over on the high line flume the next day, do you know? A. On the high line flume; yes.

Q. How long did you continue to work on the high line flume?

A. A matter of two or three days more. I went into this tunnel along about the tenth—ninth, tenth or eleventh of the month. [522]

Q. What tunnel do you mean?

A. The Parish #2.

Q. Is that the upper or lower tunnel on the Parish #2? A. The upper tunnel.

Q. Then, how long did you continue to work on that upper tunnel?

A. I continued there until the first day of November.

Q. Do you remember along about that time, the latter part of October, or the first of November, of some people doing some work down below you on some kind of a grade or building a flume or something of that kind?

A. Yes, they were grading for a flume and building a flume, both.

Q. Now, when you worked in this upper tunnel, what did you do with your muck?

A. I threw it down the hill into the creek.

Q. Did they dump it down the creek all the time you were working there up to some time that you had a row with Mr. Kennedy?

(Testimony of Dan Reardon.)

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A. They always gave warning, every time.

Q. Did you see what the people under Kenzie did when you people gave the alarm of firing blasts?

A. Well, part of the time I could see them and part of the time I didn't see them.

Q. What would they do—get out of the way or stay in the same place?

A. They generally got out of the way; yes.

Q. How long were you working there on the third?

A. That day of the third I worked until about five o'clock, I think.

Q. What became of Kenzie's people?

A. Well, they were trying to put in a dam down there but they couldn't very well do it, and along in the afternoon there was four or five men on the other side of the creek pulling a few poles down there—they didn't do any more work down in the bed of the creek until late along in the evening.

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(Testimony of Dan Reardon.)

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A. The Parish #2.

Q. Is that the upper or lower tunnel on the Parish #2? A. The upper tunnel.

Q. Then, how long did you continue to work on that upper tunnel?

A. I continued there until the first day of November.

Q. Do you remember along about that time, the latter part of October, or the first of November, of some people doing some work down below you on some kind of a grade or building a flume or something of that kind?

A. Yes, they were grading for a flume and building a flume, both.

Q. Now, when you worked in this upper tunnel, what did you do with your muck?

A. I threw it down the hill into the creek.

Q. Did they dump it down the creek all the time you were working there up to some time that you had a row with Mr. Kennedy?

(Testimony of Dan Reardon.)

A. Yes, dumped it down every day or every second day.

Q. Was there any other place to dump it?

A. No, sir.

Q. You know a Mr. Kennedy, who is an assistant superintendent of the Treadwell Company and also the Alaska-Juneau Company?

A. Yes, I know him.

Q. Did you see him up there at any time along about the latter part of October or the first of November?

A. Yes, I see him there the 31st of October.

Q. Did he have any men doing any work under him?

A. Why, yes; he had men building the flume underneath there where we were dumping down this muck.
[523]

Q. Did you have any conversation with Kennedy yourself or any of his men?

A. Why, Kennedy and I think it is the foreman of the flume and some other men came up to where we were working and told us not to dump any more stuff down there.

Q. Did they say why? What was the conversation?

A. Because we were busting up his flume. They had the bottom of the flume laid but no stulls yet laid on the flume, and they claimed it was damaging their flume.

Q. Whom did he make that claim to or did he have a conversation with?

A. He had a conversation first with Maloney, I

(Testimony of Dan Reardon.)

think, and afterwards me and him had a talk.

Q. Just what was said between him and Maloney there in the first place that you saw?

A. I couldn't hear what was said first between him and Maloney.

Q. How much of it did you hear?

A. I told him that we had orders to throw the stuff down there and for him to go and see Al Graham or the engineer, and he said that he wouldn't do anything of the kind, that it was up to us to do that, and I told him I would still continue throwing the stuff down, and he said he would have me arrested if I did, and he said it was a continuation of the same thing that happened a month before with Mackey and Al Black and those other fellows.

Q. Now, on that date that you had the conversation with Kennedy were you dumping the muck in the same place you had been dumping it or did you dump it in a new place?

A. Dumping it in the same place.

Q. Was that about all the conversation you remember, or was there anything else? [524]

A. He went down the grade and came back again and Maloney went up and told Graham about this trouble, and I asked him if he couldn't leave this place open, that we would throw the stuff down about every second day,—leave a place there or cover it over, and he said, "No"—we could cover it over if we wanted to; he wouldn't do it.

Q. Do you remember seeing a deputy marshal up there named Lund? A. Yes, I saw him.

(Testimony of Dan Reardon.)

Q. What was he doing up there?

A. He was standing down on the flume for a little while and he came up after this conversation and told me I had better not dump any more stuff down there.

Mr. HELLENTHAL.—We object to that. I insist he first show that Mr. Lund had any connection with the Alaska-Juneau Company.

By the COURT.—On the assurance of counsel that he would furnish the evidence that he has promised, the objection will be overruled and you can move against it if he does not furnish it.

Q. What was this man Lund doing?

A. He was down on the flume, and he came up and he told me and Maloney we had better not throw any more stuff down there, that we were busting up that flume, and I told him we were sent here to do it and asked him if he had a warrant that we would go down town, but we were ordered to do this and couldn't quit unless we were told to quit, and the next day he came up and arrested both of us.

Q. Do you remember about what part of the time he stayed down on this flume—what flume was it he was on?

A. This was the flume that the Alaska-Juneau Company or the Treadwell was building. [525]

Q. Was he down there with these Alaska-Juneau people? A. Yes, sir.

Q. Did you see him come up there yourself any more than once that day or did he come oftener?

A. He came up that one time.

Q. That you saw him? A. Yes, sir.

(Testimony of Dan Reardon.)

Q. How many people were working there with you on that date? A. There was only one.

Q. At that place? A. Yes.

Q. Who was that? A. That was Maloney.

Q. The next day you say you were arrested—did Lund arrest you? A. Yes, sir.

Q. Did he have any warrant or show you any papers? A. No, sir.

Q. Did he have any papers or show you any papers when he came up there to arrest you?

A. I asked him if he had a warrant, and he threw his coat open and showed me his star and said, "Here it is."

Q. Said his star was his warrant? A. Yes, sir.

Q. Was there anyone else with you when he arrested you—did he arrest anybody else at the same time? A. He arrested me and Maloney; yes.

Q. Did he serve any papers on Maloney?

A. No, sir.

Q. Did he say anything to Maloney in your presence when he arrested Maloney?

A. No, he didn't say nothing. [526]

Q. At the time that you and Maloney were arrested, was there anybody else mucking out there with you or working with you on the tunnel?

A. Not at that time; no.

Q. When he took you and Maloney away then, you didn't leave anybody there to work in that place, did you?

A. Not that I know of. I was arrested and I couldn't say.

(Testimony of Dan Reardon.)

Q. I mean before he brought you down,—was there anybody else working in the tunnel with you and Maloney at the time Lund arrested you?

A. No, there was nobody else.

Q. You spoke of Graham. Who was Graham—was he in any way connected with this work you were doing there running the tunnel?

A. Why, yes, somewhat—he was the foreman at the time. We were working in different places, you see.

Q. Do you know Fred Wettrick? A. Yes, sir.

Q. Do you know where Mr. Mackey was at the time you were arrested?

A. Not any more than what I seen in the papers that he was in Ketchikan.

Q. Was he up there at work on the property—Mr. Mackey—at that time?

A. At the time I was arrested?

Q. Yes. A. No, he was not there at that time.

Q. Did you see Wettrick up there at any time?

A. Yes; I see Wettrick up there several times—pretty near every day, as far as that is concerned.

[527]

Q. Did you see him up there the day Lund came up and told you people that you had better quit dumping, etc., down there—did you see Wettrick there that day? A. I am not sure, that day.

Q. Did you see him the day you were arrested?

A. I saw him the day before.

Q. Were you present at any time that Wettrick had any conversation with any of these people that

(Testimony of Dan Reardon.)

were working under Kennedy?

A. Well, I was right close up but I didn't hear the conversation.

Q. You didn't hear the conversation? A. No.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. You told Mr. Kennedy that you had been instructed to dump your dirt there? A. Yes.

Q. Who instructed you to dump it there?

A. Why, I was instructed by the engineer.

Q. Who was the engineer?

A. By Mr. Wettrick and Mr. Graham.

Q. Why did they instruct you to dump it there, do you know?

A. Well, no, I don't know. I had to dump it there; we were driving a tunnel.

Q. That was at the mouth of the tunnel?

A. That was at the mouth of the tunnel.

Q. You got your instructions to dump your dirt right there?

A. We had to dump the dirt whenever the tunnel was full.

Q. But why do you reckon you were instructed—if that was the natural place to dump it why did they give you any specific instructions to dump it there?
[528]

A. There was no other place to dump it.

Q. That is the reason I am asking you the question—but they did tell you to be sure to dump it there? A. I couldn't dump it any other place.

Q. They told you to dump it there too—in addition

(Testimony of Dan Reardon.)

to being the only place you could dump it, they told you to dump it there? A. Sure thing.

Q. And that was before you had this trouble with Kennedy? A. Why, yes, a long time before that.

Q. They expected Kennedy and his crew along there after a while, didn't they?

A. I don't know anything about that.

Q. But they told you to dump it right there—Wetrick and Graham?

A. Not necessarily, because we had to dump it there to drive the tunnel.

Q. But you had a conversation with them in which they told you to dump it there, didn't you?

A. Yes, sure.

Q. And that was before Kennedy had come along?

A. That was when the trouble came up—they told me to dump it there, that we had to dump it there.

Q. That was before you had the conversation with Kennedy?

A. I didn't get no instructions when I started there, where to dump it.

Q. But before Kennedy got there, before you had trouble or talk with Kennedy that day, they had told you to dump it there?

Objected to. Objection overruled. Plaintiff allowed an exception. [529]

Q. Had they or had they not told you to dump the dirt right where you were dumping it before you and Kennedy had the conversation or afterwards?

A. Afterwards, not when I started there. I didn't get no instructions where to dump it when I started there.

(Testimony of Dan Reardon.)

Q. And it was after you had your talk with Kennedy that day that Wettrick told you to dump the dirt in this same place that you were dumping it?

A. Yes, sir.

Q. Then why did you tell the Court a minute ago that in your conversation with Kennedy you told Kennedy that they had ordered you to dump it there before that time?

A. Sure; because I will tell you how that came in—when Kennedy ordered me first not to dump any more stuff down there I quit—I didn't want to bust up the flume—I quit then for a few hours and I got instructions from Wettrick to give them orders to either cover that over or open a place and if they didn't do either one, to dump it down at a certain hour—fifteen minutes after three o'clock.

Q. Now, then, when you had trouble Mr. Graham sent for Mr. Lund, didn't he?

A. I don't know about that.

Q. You don't know about that? A. No.

Q. Lund wasn't down there at that part of the creek before that time, was he?

A. I hadn't seen him before that time.

Q. As a matter of fact, you know that he was up here a little below the Ebner dam—he and Captain Martin were up there where there were two parties working against each other on [530] what is known as the Fraction Placer,—you know that?

A. Yes, sir.

Q. And they had sent you up there to preserve order between those two parties?

(Testimony of Dan Reardon.)

A. I think so, yes.

Q. And you don't know who sent for Lund or brought him down here? A. No, I don't.

Q. When you got into court here, did you ask the Court if a warrant had been issued against you?

A. No, I never asked nothing.

Q. So you don't know, as a matter of fact, whether there was a warrant or not?

A. Yes; there was a John Doe warrant. I found that out on the second day of November.

Q. John Doe—and directed them to serve on the men that had been dumping the dirt?

A. I suppose so.

Q. Because they didn't know your name?

A. They didn't know my name.

Q. What time did you say you went up there to work? A. I went up on the first day of October.

Q. Had you been up the creek shortly before that?

A. Before the first of October?

Q. Yes. A. No, never in that basin before.

Q. When you got up there you noticed this house here that Harry was living in?

A. I don't know that I noticed it the first time.

Q. But very shortly afterwards? A. Yes, sir.

[531]

Q. And you noticed the crew of men along the cliff there?

A. You mean where they were building the sluice flume? What crew of men?

Q. You could see different spots on the cliff where they had been working for a flume line?

(Testimony of Dan Reardon.)

A. You mean what company—this company?

Q. No, the Alaska-Juneau.

A. I didn't notice it the first day, but the second or third day after.

Q. Shortly after? A. Yes.

(By Judge WINN.)

Q. Mr. Shackelford asked you about a placer claim up there. Do you know where this man Harry went to when he left this cabin down near Snowslide Gulch? A. Yes, I think I do.

Q. Where did he go?

Mr. SHACKLEFORD.—What time?

Q. After he left the Snowslide Gulch cabin, where did Harry go? You know approximately about the time that Harry left this cabin down near Snowslide Gulch; I don't mean the exact time.

A. He was there on the 11th of the month, anyhow, of October.

Q. Did you see him up there in the employ of this Alaska-Juneau Company after that? Did you see him doing any thing for Kenzie's people after he left the cabin?

A. Why, there was five or six of us up in the boxes and turned the water out of that creek on this new flume, and he came up and told us not to go any further, after this box was in that we would be trespassing—that was about all I see him do.

Q. You saw Harry? [532] A. Yes, sir.

Q. Do you know anything about his going up to this placer claim Mr. Shackelford was questioning you about? A. That is the place.

(Testimony of Dan Reardon.)

Mr. HELLENTHAL.—That is half a mile away from this property. We object to it.

Judge WINN.—I want to show that Mr. Lund, whom we have just referred to, I want to show that he is the same man that had been brought up by this company, up on the placer—

By the COURT.—You may show that.

Q. Now, this man Lund that Mr. Shackleford questioned you about as being up there on the placer claim, he is the same man Lund that you had this conversation with that you have testified to?

A. The same man; yes.

Q. Do you know what this same company, under Mr. Kenzie's people, were doing up there on the placer that necessitated Mr. Lund, a deputy marshal, to be up there?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial.

Objection sustained. Plaintiff allowed an exception.

Judge WINN.—We expect to show that we didn't get him up there.

Q. Do you know who Harry was working for, this man O. M. Harry? Did he ever tell you?

A. Yes; he told me he was working for the Alaska-Juneau, the Treadwell Company.

Q. I will ask you if you know anything about his going up on this placer claim that Mr. Shackleford has just questioned you about and pitching a tent across the right of way of Mr. Mackey's company and living in that tent? [533]

(Testimony of Dan Reardon.)

Mr. SHACKLEFORD.—I object to that is incompetent, irrelevant and immaterial to the issues in this case.

Objection sustained. Plaintiff allowed an exception.

Q. I will ask you if you ever saw Harry's tent up there on this placer claim that Mr. Shackelford questioned you about?

Judge WINN.—I expect to follow this up by showing this state of facts. That this tent was pitched up there across the right of way at the time that this arrest was made, the last arrest, and that they went up there and pitched the tent across a well-cleared piece of right of way, and at a point up to which, about, we had built our flume, and that this same man Harry, who had been down in the cabin below, had gone up there and raised these disturbances, and I will show that we had to change our flume-line and build around his tent to avoid any trouble, and these matters were all done simultaneously, showing the intent of these people to go up there and, if possible, to get possession of every piece of the Ebner property they could, and do it by means of the marshal, and we will follow it up by showing we never asked the marshal to go up there, that these parties asked him to go up there, and even sent telegrams as far back as Washington City to get some new deputies to go up there, through Mr. Rustgard.

Mr. SHACKLEFORD.—We shall object to that as immaterial. The presence of a tent on that grade don't connect the man in any way with it. We shall

(Testimony of Billy Moore.)

object to it as incompetent, irrelevant and immaterial.

Judge WINN.—We will show the man was living there, and our people talked to him, etc., and show photographs showing where we turned our line of flume to get out of the way.

Objection sustained. Plaintiff allowed exception.

Witness excused. [534]

[Testimony of Billy Moore, for Plaintiff.]

BILLY MOORE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your name? A. Billy Moore.

Q. What is your business? A. Carpenter.

Q. How long have you lived in Southeastern Alaska? A. I came here in 1897—in the fall.

Q. Do you know what is called the Ebner property, up Gold Creek, a short distance from Juneau?

A. Yes, sir.

Q. Did you ever work up there? A. Yes, sir.

Q. What year? A. 1910.

Q. Under whom? A. Mr. Mackey.

Q. What kind of work did you do?

A. I was doing general work, part of the time doing carpenter work. When I first started there, there was no carpenter work there, and I was doing laboring work—roustabouting.

Q. What day did you go up there first to work?

A. 25th day of September, 1910.

(Testimony of Billy Moore.)

Q. Where did you work on the 25th day of September, 1910, when you went up there?

A. I worked right there opposite the Ebner boarding-house on the high line flume, the new flume they had constructed, built—on the grade.

Q. What were you doing on the 26th and 27th of September? [535]

A. I was working right at the same place.

Q. The 28th? A. The same place.

Q. How long did you continue to work in that same place? A. Until the first of October.

Q. Where did you work then?

A. Went building a trail over on the sidehill.

Q. Over on the opposite side of the creek from where you had been working? A. Yes.

Q. You have heard the testimony of some of these other witnesses who referred to you as working over there—you are the same Billy Moore?

A. Yes, sir.

Q. Do you know where there is a brushed-out line commencing at an old cabin on the right-hand side of the creek as you go up and is brushed out down to the creek and then on across the creek—do you remember a brushed-out line there?

A. Yes; I know a survey line was brushed out there.

Q. This work you were working upon—the trail you were working upon—was that up the creek from that cleaned-out trail or down the creek from the trail?

A. It was up the creek and lower down the hill.

(Testimony of Billy Moore.)

Q. What days were you working there?

A. I went to work on the first day of October.

Q. Who else was working there with you?

A. There was several men working there.

Q. Will you name some of them?

A. There was Reardon, Black, Seitz and some others I don't know.

Q. Do you know Mr. Kenzie?

A. I know him by sight; yes, sir. [536]

Q. Do you know a man that you afterwards found out to be Burch, that was up here about that time?

A. Yes, I have seen him.

Q. What was the first time that you saw any of these people that were working under Kenzie up about where you were working on the hillside or down the creek from where you were working?

A. I think it was on the third day of October.

Q. Where were you working when Kenzie and his people came up there and undertook to commence their work—where were you working?

A. When I first went to work there, there was some working on the opposite side of the creek, on the right-hand side of the creek as you go up, some of the Treadwell men.

Q. Were you working on this Lotta claim all day on the third? A. Yes.

Q. What time did you commence to work there on the third?

A. I went over there, I guess, about—between nine and ten o'clock.

Q. When you went down there to go to work on

(Testimony of Billy Moore.)

the Lotta was Kenzie and his people there?

A. I didn't see anybody at all there.

Q. About what time did you see Kenzie and his people on the third?

A. It was somewhere, I think, about eleven o'clock—there was some men came up there—ten or eleven. They came up there on the opposite side of the creek from where we were pulling poles down toward the creek.

Q. And where were you working when Kenzie's people came up?

A. I was cutting brush on the trail that leads down to the tunnel.

Q. Were you working above that brushed-out line at the time [537] that Kenzie and his people came up or were you working on this side of it, down the creek?

A. No, I was working above it and lower down the hill.

Q. What did this people—that is, Kenzie's people—undertake to do the first thing when they came up there on the third day of October?

A. The first thing I saw them do, I saw them getting some poles down the sidehill, on the left-hand side going up.

Q. Where were those poles taken from?

A. I suppose they were taken down the wagon road—they hauled them in the wagon road, I guess. They were on the hillside when I saw them.

Q. How near the wagon road?

A. Thirty or forty yards below the road or twenty

(Testimony of Billy Moore.)

yards or something.

Q. That was the first work they undertook to do?

A. That was the first I see.

Q. What took place—did you people do anything to resist them coming down there?

A. I cut trail part of the time and part of the time shoveled and drove rocks—general work along the hill.

Q. What other kind of work, if any, did the people under Kenzie do during that time while you were there, besides taking the poles down, I mean?

A. I don't know what they did do. There was a box there—they were trying to get a little box across the creek, I think, on the third.

Q. Did those people finally blast—did you hear them blast that day?

A. I couldn't say for sure whether they did or not. There were several blasts fired; I don't know who did fire them. I was [538] a little ways from where they were working—I was down the creek, further.

Q. You were not firing any blasts? A. No.

Q. What kind of work did you continue to do?

A. Packing steel and packing tools down there and powder and pick and shovel a while and cut brush a while—general work.

Q. From what place to what place did this trail lead that you were working on?

A. It was a kind of near cut to the lower tunnel, coming from the Ebner boarding-house. The other trail went way up to the cabin and went down.

(Testimony of Billy Moore.)

Q. When you say the lower tunnel, what tunnel do you mean?

A. I am not very well acquainted with it.

Q. Do you mean that tunnel that Reardon was working in?

A. Reardon and Mike McKenna was working in the tunnel,—I got the steel, brought it down and sharpened it and took it back.

Q. Whom were you sharpening it for?

A. Reardon and McKenna. I took it to the blacksmith-shop down from where they were working.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. I understand that you first went to work on the Lotta, above where that dam is now? A. Yes.

Q. And at the time that these men were putting the poles in, they were putting the poles in at the same place where the present dam of the Alaska-Juneau Company is?

A. I believe so, yes—just about the same place.

Q. And you started out from the Ebner boarding-house to make [539] a trail down to the lower tunnel on Gold Creek—is that the idea?

A. Yes, that is the way I understood it.

Q. Were you there when the trail was started?

A. No; there was some of it done before I went there.

Q. It was an old trail?

A. It was an old wagon road or something, cleaned up.

Q. Clearing out an old road? A. Yes.

(Testimony of Billy Moore.)

Q. Where were you when the Alaska-Juneau people arrived?

A. I was down the creek just a little ways—probably, I guess, thirty or forty yards.

Q. How many men were there there when the Alaska-Juneau people arrived there?

A. I couldn't tell you exactly the number. There was Adolph Meyer and three or four of us at the lower end and quite a number where they were blasting. I don't know how many.

Q. You were not up to where they were blasting?

A. No, sir; I was a little ways from them.

Q. How far away? A. Twenty or thirty yards.

Q. Did that party have any drills with them—were they drilling into the rock?

A. No, I don't believe they did.

Q. I wish you would be kind enough to tell the Court what it was they were blasting without having drill holes.

A. They had big, long bars; they would jog them down.

Q. In the ground? A. Yes.

Q. They piled up a lot of little boulders and things and then they would blow this out? [540]

A. I don't know. I wasn't there where they were working. I see them with the long bars.

Q. They were working over an old roadway?

A. No, not at this place; they had left the roadway then.

Q. Where did the roadway come from there?

A. It comes down the sidehill.

(Testimony of Billy Moore.)

Q. And branched down towards the creek?

A. Yes, down lower.

Q. They were not doing any rock work?

A. No, not in solid rock; no.

Q. The growth up there is all young growth, is it not? A. Yes, small.

Q. There is no heavy stumps?

A. No, nothing very heavy.

Q. I understand you to say you started to work at what time? A. The 25th day of September, 1910.

Q. And when you went up there the Alaska-Juneau people were up there?

A. Yes, there was a house built there when I went up.

Q. You saw some work along the right of way then, too?

A. Yes; at one place close to the house I see where there had been some work done, close to a cabin, built on the right-hand side of the creek as you go up—a little work was done there near the cabin.

Q. There had been a tunnel started there?

A. Yes, I saw the hole; yes.

Q. You didn't see the end of the hole?

A. No, I never was over there.

Q. And that tunnel was quite a little piece up the creek from the house?

A. Just a little ways; yes. [541]

Q. Who employed you? A. Mr. Mackey.

Q. You were one of the employees of the California & Nevada Copper Company? A. Yes, sir.

(By Judge WINN.)

(Testimony of Billy Moore.)

Q. Do you know who lived in this little cabin that was built down near Snowslide Gulch, under the rocks there? A. Yes, I heard his name.

Q. Who lived there?

A. A fellow they called Harry.

Q. Is that the cabin you referred to, that Mr. Shackleford questioned you about? A. Yes, sir.

Q. Do you know how long Harry stayed down there in that little cabin under the rocks?

A. No, I do not.

Q. Do you know where he went to after he left that place? A. Yes, I do.

Q. Where did he go?

A. He went on the right of way of the high line flume.

Q. What did he do up there?

By the COURT.—Mr. Shackleford admitted he put his tent on your right of way—what you claim as your right of way.

(By Mr. SHACKLEFORD.)

Q. When was it you went over on this Lotta claim work, what day?

A. The first day of October.

Q. Where had you been working before? [542]

A. Over on the high line flume, the new grade.

Q. On the grade of the high line flume?

A. Yes, sir.

Q. How many men were taken off of that job and put over here that day?

A. There was three men over there—two besides myself.

(Testimony of Billy Moore.)

Q. Who were those two men?

A. There was Adolph Meyer and I don't know the other fellow's name.

Q. They moved you over there that day?

A. Yes.

Q. Did you have any instructions when you went over there? A. No.

Q. You were just placed under the charge of Mr. Black? A. Yes; Black acted as foreman.

Q. You don't know why you were moved over that day?

A. No, they didn't tell me any reason whatever.

Witness excused. [543]

**[Testimony of Grover Winn, for Plaintiff
(Recalled).]**

GROVER WINN, recalled.

(By Judge WINN.)

Q. You are the same G. C. Winn who was on the witness-stand yesterday, and are United States Commissioner for the Juneau Precinct? A. Yes, sir.

Q. And you were such during the months of October and November, 1910? A. Yes, sir.

Q. I will hand you, after identification, a paper termed a complaint, which appears to be signed by G. Crandall Jones and dated on the first day of November, 1910, and appears to be subscribed and sworn to before G. C. Winn. I will ask you if you know that paper. A. Yes, sir.

Q. Do you know who the Jones was that swore to that complaint—what he was doing at that time?

A. I do.

(Testimony of Grover Winn.)

Q. What was he?

A. He was in charge of the work of the Alaska-Juneau flume or so he informed me at that time.

Q. That complaint was sworn out in the regular routine of criminal business that takes place in your court? A. It was.

Q. I will ask you if there was any warrant issued on that complaint by you? A. There was.

Q. I will now hand you what purports to be a warrant, dated November 1, 1910, and has the words G. C. Winn, Commissioner and Ex-officio Justice of the Peace on it, and ask you if that is the warrant? [544]

A. Yes, sir; that is the warrant that was issued on that complaint.

Q. What time was that warrant issued with respect to the time of the filing of the complaint in your office? A. Immediately following.

Q. To whom did you deliver that warrant?

A. Hector McLean.

Q. Who is Hector McLean?

A. He is an office deputy in the U. S. marshal's office, First Division.

Judge WINN.—We first offer in evidence the complaint in this case and wish to have it copied into the record, and then we will follow it up by offering the warrant.

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

(Testimony of Grover Winn.)

The complaint is marked Plaintiff's Exhibit "S" and copy is attached hereto and made a part hereof.

Judge WINN.—We now offer in evidence the warrant and wish to have it copied into the record.

Same objection. Overruled. Exception.

The warrant is marked Plaintiff's Exhibit "T," and copy is attached hereto and made a part hereof.

Q. Now, in this warrant—I notice it is first entitled, "In the United States Commissioner's Court for the District of Alaska, Division #1, Juneau Precinct. Warrant. United States of America versus John Doe and Richard Roe." I will ask you if at the time you issued that warrant if those were the only names that were placed in it.

Mr. HELLENTHAL.—We object. It is presumed that this officer [545] did his duty in accordance with the law. And the further objection that the question does not state the facts as they are—the warrant does not read as Judge Winn says it reads. The warrant reads, The United States against Al Graham and some other parties; there is no warrant here reading John Doe or Richard Roe.

By the COURT.—Objection sustained; you may ask the witness what names were in the warrant when it was issued.

Q. I will ask you what names were in the warrant at the time it was issued.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

(Testimony of Grover Winn.)

A. Graham's and John Doe's and Richard Roe's—those were the three names, and under the John Doe and Richard Roe—whose true names are not known.

Q. You said when the warrant was first issued the names were Al Graham, John Doe and Richard Roe—I will ask you when were the names of Harry Maloney and D. J. Reardon placed in there, if you know?

A. Yes, I know; as soon as they were arrested or before the warrant was returned to me, that is, McLean inserted the names of Harry Maloney and D. J. Reardon in place of John Doe and Richard Roe, whose true names are not known; it was explained at that time who the gentlemen were.

Q. Reardon was afterwards brought before you—what deputy marshal brought him down there before you? A. Reardon?

Q. Yes—D. J. Reardon, Dan Reardon—who brought him down? A. Lund.

Q. Lund brought him down? [546]

A. Yes, I think so—yes, Lund brought him down.

Q. And who brought in Harry Maloney, the other John Doe? A. Lund made the three arrests?

Q. Al Graham? A. Yes, sir.

Q. Did he bring all three of them in at the same time?

A. I don't think so. As I remember, there were two of them at one time, and as I recollect now, they brought in Graham the next morning, couldn't get service on Graham the night before—something like that—and they retained that warrant. The warrant

(Testimony of Grover Winn.)

wasn't returned to me until the next day or the day following that. They retained that warrant in order to arrest Graham.

Q. You don't know when, if ever, this warrant was delivered to Lund, do you?

A. No; all I know is when it was delivered from my office to the marshal's office.

Q. I hand you another complaint signed by George C. Jones, dated on the second day of November, 1910, and sworn to before G. C. Winn, Commissioner and Ex-officio Justice of the Peace, which is entitled, United States of America versus F. J. Wettrick, and ask you if that complaint was sworn out in your court before you? A. It was.

Q. The man Jones named in there is the same man Jones who swore to the complaint in which the warrant was issued against Graham, John Doe and Richard Roe? A. Yes, sir.

Q. Is the warrant attached to that?

A. Yes, sir; the warrant is attached to that.

Q. There is a warrant attached to that which is signed by you [547] and dated November 2, 1910—is that the warrant you issued on that against Wettrick? A. It is.

Q. When was Wettrick brought to you, do you remember?

A. The second day of November—the same day the warrant was issued.

Judge WINN.—We now offer in evidence the complaint and warrant in this case and ask that it be

(Testimony of Grover Winn.)

copied into the record and the files returned to the commissioner.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

By the COURT.—It is so ordered.

(Copies of the complaint and warrant are attached hereto and made a part hereof.)

Q. Now, I hand you a book here which you had yesterday called Criminal Journal, Juneau, Commissioner's Court, and I will ask you if that is part of the records of your office. A. It is.

Q. Just in a general way, what does page 234 of this book show?

A. My record of the case of the United States versus Graham, Reardon and Maloney.

Q. And shows the final disposition of this case?

A. Yes, sir.

Judge WINN.—We offer in evidence the type-written part of page three (234), which shows a demurrer was filed, demurrer sustained and the defendants discharged.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

(Page 234 to be copied and attached hereto as a part hereof.)

Q. I will ask you if at that time and at the time of the argument of the demurrer to the complaint in

(Testimony of Grover Winn.)

this case, if any [548] other attorney appeared there besides Judge Folsom, the assistant district attorney, in aid of the prosecution of these cases.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. I wouldn't say appeared there directly as a private prosecutor in the cases. Mr. Bayless appeared, I believe, at the time—I know that Wettrick's complaint was sworn to. He was not present, however, at the time that Jones swore to the first complaint against Graham et al., but he was present at the preliminary or at the time we set the cases in Graham and others, and about twenty minutes after that is when they swore out the complaint against Wettrick. He was present at that time. I don't remember whether Bayless or any other counsel were present at the time of the argument of the demurrer.

Q. Just let me refresh your mind on that. I appeared there in defense of the parties arrested?

A. Yes, sir.

Q. And don't you know that when Judge Folsom was arguing the demurrer he and I had about completed the argument of it, when Mr. Bayless got up and asked to be heard and Judge Folsom and I raised the objection that he was one of the attorneys for the Treadwell Company? A. Oh, yes.

Q. And had no order of the Court to aid as a special or private prosecutor and you overruled my objection?

(Testimony of Grover Winn.)

A. I remember it now. Si Hellenthal was also there.

Q. And then do you remember the instant that took place, you took a recess? [549]

A. Yes, and they retired—or Mr. Bayless asked to. Objected to. Sustained.

Q. However, you overruled my objection but Mr. Bayless didn't get up to make his speech afterwards?

A. No.

Objected to. Sustained.

Q. Now, on the next page of this criminal record of your office or journal, you have the final disposition of the case against Wettrick? A. I have.

Q. How did that fall by the wayside?

Objected to as not the best evidence.

Judge WINN.—We now offer in evidence page 235 of this record, showing the disposition of the case of United States versus F. J. Wettrick, and ask that the stenographer be permitted to copy it into the record.

By the COURT.—It is so ordered.

(Copy of page 235 is attached hereto and made a part hereof.)

Q. Now, then, after the discharge of Mr. Wettrick and Al Graham and Maloney and Reardon, have they ever been since that time prosecuted in your court, for the offense that they were up before you for, at that time?

Objected to as incompetent, irrelevant and immaterial.

Objection sustained. Plaintiff allowed an exception.

(Testimony of Grover Winn.)

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. None of these men were ever kept in custody?

A. No.

Q. As soon as they appeared, bail was set and they gave bail.

A. Yes, within an hour or an hour and a half they were allowed [550] to go on their own recognizance—for an hour or an hour and a half.

Q. And in these particular cases the men were on their own recognizance?

A. No; that was only for the course of an hour or so.

Q. Until they got bail?

A. Yes, so Wettrick could arrange bail.

Q. And as soon as they got bail they were let loose?

A. Yes, they were released naturally on getting bail.

Q. And then the men who were named Roe and Doe were described to you as persons who had committed the alleged trespass and whose names they had not been able to obtain? A. Yes, sir.

(By Judge WINN.)

Q. Who described them to you?

A. G. C. Jones.

Q. This same officer of the company?

A. Yes, sir.

Q. What you mean to say when you say that these parties were not in custody, you mean they were not put in jail?

A. Yes, that is what I mean—they were in the

(Testimony of Grover Winn.)

custody of the court; that is all.

Q. If they had not gotten that bond, though, you would have had to put them in jail? A. Yes, sir.

(By Mr. SHACKLEFORD.)

Q. G. C. Jones is the man in charge of that work, on that flume? A. He so informed me.

Q. The reason I asked you that question, Judge Winn has referred [551] to him as an officer, and I apprehend that some time that word might be referred to in the future as referring to him, as a civil or governmental officer.

Judge WINN.—Did he tell you he was assistant superintendent up there of the Alaska-Juneau Gold Mining Company? A. Yes; I believe he did.

Judge WINN.—That is all.

Witness excused.

Judge WINN.—I will recall Mr. Wettrick. [552]

**[Testimony of F. J. Wettrick, for Plaintiff
(Recalled).]**

F. J. WETTRICK, recalled as a witness in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. You are the same Wettrick who has testified in this case before, are you not? A. Yes, sir.

Q. Did you have anything to do with the surveying out or laying out of any flume or tunnels upon the Ebner property in 1910? A. Yes, sir.

Q. Did you hear Lloyd Hill's testimony on the witness-stand? A. I think I heard some of it; yes.

Q. What right of way for a flume-line did you and

(Testimony of F. J. Wettrick.)

Lloyd Hill in 1910 survey out on this Ebner property?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. We had charge of the location of the flume grade for the new high line flume that the company contemplated building, and has since built, beginning at the point of intake, being by the old Ebner dam, the large dam above the mill, and running down toward Shady Bend. This work of surveying, locating, taking the levels, etc., was done from time to time.

Q. Did you do anything towards surveying out a tunnel-site that season, too?

Same objection. Objection overruled. Defendant excepts.

A. The location of a tunnel.

Q. Yes. A. Yes.

Q. Do you know what time you commenced that work, the tunnel work?

A. You refer to the cross-cut tunnel near the mill-site? [553]

Q. I mean the survey you did on what is known as the Ebner mine tunnel? A. The large tunnel?

Q. Yes.

A. That was done—the tunnel was definitely located by means of data that had been obtained during the course of the summer on about the latter part

(Testimony of F. J. Wettrick.)

of November, I believe—I am not so sure about that date.

Mr. HELLENTHAL.—How is that?

A. The latter part of November or the first of December—I am not so sure about that date.

Q. That is the time it was permanently located?

A. Yes; observations were taken from time to time before that, but the location of the site was made at that time and the course of the tunnel given about the first part of December, I believe it was.

Q. What time did you commence surveying, if you remember, on this right of way for the flume?

A. About the first of August, I think.

Q. Now, Mr. Wettrick, were you on and off of this property frequently or otherwise during the summer of 1910?

A. I was on that property very frequently.

Q. Were you at all times engaged in surveying or did you have control of any other work up there during that summer?

A. I had control, was in charge of the construction work on the flume part of the time and the general management in Mr. Mackey's absence of the entire work.

Q. Do you know anything about the incidents that took place up there on the third of October?

A. No, I do not—by reason of having been on the ground at that time I do not. [554]

Q. You were not present up there?

A. I was not.

Q. Now, some time along about the latter part of

(Testimony of F. J. Wettrick.)

October or some time in November was Mr. Mackey here?

A. About that time he was not there, at the time I had charge of the work.

Q. He went away and went to Ketchikan, didn't he? A. Yes, sir.

Q. And what, if anything, were you to do or what part of the business did you have charge of in Mr. Mackey's absence?

A. Seeing that the construction of the flume was prosecuted with diligence and that the general work as it had been planned by the people in charge was carried out.

Q. You later on that summer surveyed the Parish road claim #2 for patent? A. I did.

Mr. HELLENTHAL.—We object to the evidence of the surveys for patent. I want the record to show whether this survey was ever followed by any application. We object to it as incompetent, irrelevant and immaterial and not the best evidence.

By the COURT.—The objection will be overruled. You can bring out in cross-examination any further details of what the work consisted of.

Defendant allowed an exception to the ruling.

Q. Now, at that time when you made the survey did you find any tunnel work upon the Parish #2?

A. I did.

Q. When did you survey it for patent? I didn't get the date.

A. The date of the survey was during the first part of the [555] month of November. The or-

(Testimony of F. J. Wettrick.)

der for survey was issued from the surveyor general's office on the 20th day of September, I believe, and having other duties at that time I did not immediately go upon the ground to survey it for patent, but did as soon as I could.

Q. Prior to this time that you made the survey for patent, as you state, did you know anything about this work that was going on on the Parish #2 claim?

A. Yes, sir.

Q. When did you first take cognizance of or have any personal knowledge of any work that was being done on the Parish #2 claim during the year 1910?

A. I had seen what has been referred to here as the lower tunnel on the Parish #2 from time to time, and did see it from time to time before the—well, during the month of August,—that was the time I went upon the ground again to observe matters in more detail.

Q. Now, in making this survey of the claim for patent, did you make any measurements as to the depth into the mountainside that this tunnel that you speak of had been driven? A. Yes, sir.

Q. I wish you would give that to the Court.

A. There are two tunnels upon the Parish claim, each with a length of 32 feet.

Q. Parish #2?

A. On the Parish #2, yes, and also an open cut that is 19 feet long.

Q. Do you know what portion of this work was done during the year 1910?

A. Yes, the upper tunnel was completely driven

(Testimony of F. J. Wettrick.)

in 1910 and the [556] lower tunnel was continued to a greater depth also.

Q. Now, Mr. Wettrick, in making your survey I will ask you, what part of the work did you measure up and take into consideration when you were making your survey for patent?

A. I took all the work that was plainly visible upon the claim. I saw that I had more than was necessary to make the return of the survey and just took that which was plainly visible upon the claim, including the two tunnels and the open cut. I think that is all I mentioned in the returns, except that I mentioned also the road that was built on the Parish claim on the left-hand side of the creek as part of the development work.

Q. Do you remember your estimation of the cost of just the two tunnels and the open cut alone?

A. Yes, I do.

Q. What was it?

A. The total value for the tunnels is \$960. The open cut was valued at \$100, making \$1,060 for the tunnels and the open cut.

Q. You didn't go over this work as to where the old tunnel used to be up there on one of these claims and go into the Borean pit or any of those matters at all in the construction of your return there?

A. No, sir; I didn't estimate that at all, its size or anything else, except those items I have mentioned.

Q. And any clearing off of the surface of the ground, you didn't take that into consideration?

A. No, sir.

(Testimony of F. J. Wettrick.)

Objected to as leading. Sustained.

Q. This open cut, you say, is about how long?
[557]

A. Nineteen feet, I think my returns show.

Q. Was that put there in 1910?

By the COURT.—You are asked about what you recollect. Counsel made an objection in the beginning that your statement was not the best evidence. Nothing has appeared to indicate that you ever made a return. If you do not remember from your recollection, the return had better be produced, not giving your opinion as to what the returns show.

The WITNESS.—I remember that distinctly—that that open cut was 19 feet long.

Q. You say while Mr. Mackey was absent from this work in 1910 that you had somewhat charge of the work. I will ask you if any work was being carried on in either one of these tunnels on the Parish #2 in the absence of Mr. Mackey. A. Yes, sir.

Q. Which one of the tunnels?

A. The upper tunnel.

Q. You are the same Wettrick that Reardon referred to in his testimony a few minutes ago on the witness-stand? A. I apprehend I am; yes.

Q. Do you know about the date that Mackey left here?

A. I don't know the exact date; no.

Q. When he left, whatever time that was, was there anybody at work upon the Parish #2 in either one of these tunnels?

(Testimony of F. J. Wettrick.)

A. Yes; there was work being carried on in the upper tunnel.

Q. Now, Mr. Wettrick, there has been some testimony and evidence here about a cabin that this man Harry was living in for a while. I will ask you if you have indicated on this plat and map called plaintiff's Exhibit "N"—I wish you would explain how you have indicated it.

A. The cabin is indicated as standing on the right-hand side of [558] Gold Creek going upstream and is here designated as the Alaska-Juneau Company's house as shown by us on this plat and upon the ground, within the boundaries of the Cape Horn lode claim.

Q. I will ask you to state to the Court from the examination of this plat and the scale upon which it is made and from what measurements you have made up there, if you would be able to tell me about what portion of the newly completed flume of the defendant company is below the lower side line of the Parish #2 lode claim?

Mr. SHACKLEFORD.—Does that refer to the present condition of the flume or the flume at the time of the controversy?

Judge WINN.—The flume as completed.

A. Approximately 400 feet, taking the curve and sinuosities in the length.

Q. That portion of the flume is on what mining claims?

A. The portion of the flume outside the boundary lines of the Parish #2 is on the Taku Queen.

(Testimony of F. J. Wettrick.)

Q. This cabin that is referred to in this map that you have just testified concerning, approximately how far off the Parish #2 claim is that?

A. Approximately 200 feet. I could tell you more definitely if I had a scale.

Q. The map is made to a scale?

A. Yes, sir. It is approximately 200 feet.

Q. Now, Mr. Wettrick, when you took charge of this work up there for Mr. Mackey, in the latter part of October and in December, 1910, I will ask you up to that date what progress had this defendant company made with the construction of its flume-line, as it was afterwards completed by them?

Mr. HELLENTHAL.—What date? [559]

Judge WINN.—The latter part of October or the first of November. Objected to as immaterial. Objection overruled and defendant allowed an exception.

A. The flume had been commenced down around that point where the present penstock is located and had been carried on, after having constructed the grade, by laying the bottom of it along the flume, up toward the Lotta claim and some men, working upon the point where the present intake is, had also constructed a little cut there and started, I believe, the bottom, had laid some timbers from the upper end of the flume where the present intake is of the dam.

Q. Have you described, now, all that the defendant company had done in the way of constructing this dam and building a flume in and about its dam,

(Testimony of F. J. Wettrick.)

when you had charge there for Mr. Mackey?

A. I didn't mention the dam—what they had done with the dam.

Q. I want you to tell all the work they had done on the upper end of their works. You told the work they had done down at the lower end, commencing at the penstock and across the Taku Queen and up towards the Parish. Now, when you took charge what, if anything, had they done from what is indicated on this map on the Alaska-Juneau Company's dam and intake down across their flume they built below?

A. The dam was practically completed. The water was running through the flume and the gate was in process of construction when I first took charge and a portion of the bottom was laid, the bottom of the flume and siding was being put on. I believe, as well as I remember it, there was a crew working by the dam, at the dam, upon the flume and one at the lower end, bringing the flume up from the lower end. [560]

Q. That is when you took charge—did they keep up that work then while you were there in charge of the property in Mackey's place? A. Yes, sir.

Q. Did they build from both ends?

A. Yes, the flume was being completed from the lower end, or partially completed—the cover was not laid—and also the intake was being laid as well and the siding put on and the flooring as I have told you from the intake.

Q. Now, Mr. Wettrick, I will ask you if you know

(Testimony of F. J. Wettrick.)

Dan Reardon and a man named Maloney and a man named Graham? A. I do.

Q. Were they doing any work in or about or upon the Parish #2 lode claim during the time you had charge of this business for Mr. Mackey?

A. The two men Reardon and Maloney were. Graham was the general foreman who went down as he was instructed to that place of operation and took charge, also to look out for the work at the upper part of the property.

Q. Do you know a man named G. C. Jones who swore to those warrants that have been identified by Grover Winn? A. Yes, I know the gentleman.

Q. What was he doing at that time?

A. He was superintending the construction of the flume and grade line down around the Taku Queen in Snowslide Gulch.

Q. That is, he was doing work for the defendant company?

A. Yes, he had charge of the operations there.

Q. Do you know a man named Kennedy, who was assistant superintendent of the Treadwell and also assistant superintendent of the Alaska-Juneau—I believe he used to be? [561]

A. I know the gentleman; yes, sir.

Q. When you were up there in charge of this work did you see either one of these gentlemen?

A. I saw both Kennedy and Jones; yes.

Q. You know where these two tunnels are, of course, on the Parish #2 lode claim. I will ask you in driving this upper tunnel where was the debris

(Testimony of F. J. Wettrick.)

or muck dumped when you first took charge of the work for Mr. Mackey up there?

Objected to as immaterial.

Objection overruled. Defendant allowed an exception.

A. It was dumped at the mouth of the tunnel, the only place it could be dumped, on the steep sidehill, so as to roll down the creek.

Q. Did they continue dumping that muck there while you had control or did they dump it somewhere else? A. They continued dumping the muck.

Q. Now, I will ask you if the defendant company under this man Jones or Kennedy were doing any work down on the defendant company's flume-line as afterwards completed while you were having this muck dumped or while the people working in this tunnel were dumping the muck down the hill.

A. They were bringing the flume from the lower end up toward the place where the muck was being dumped and also bringing the flume from the upper end towards it.

Q. You are the same F. J. Wettrick that is referred to in this complaint I have offered in evidence, sworn to by Mr. Jones, and also the same Wettrick that was afterwards arrested on a warrant, and brought before Grover Winn and discharged?

A. Yes, sir.

Q. Now, Mr. Wettrick, I wish you would tell the Court what, if [562] anything, in the way of conversations took place between you and Mr. Kennedy or Mr. Jones or anyone that had charge of the

(Testimony of F. J. Wettrick.)

work of the defendant company just about the time or a little prior to these arrests.

A. On the second day of November, I believe, it was told that our men who were working in that tunnel, Reardon and Maloney, were told to not dump any more muck and desist from prosecuting their work and that sort of thing, and I went down to the place where the tunnel was and noticed that the tunnel was full of muck, which they had allowed to accumulate, following the instructions from the defendant company and found that either the work would have to quit in the tunnel or the tunnel would have to be mucked out, and I went down on their grade and found one by the name of Schultz, who told me he was the boss carpenter in charge of the work at that place, took him over to the place whereon our muck had previously been rolling down over the hill and related to him the situation, that we either had to quit or—

By the COURT.—I don't think you should undertake to try over all these cases again or get at the merits of these criminal prosecutions.

Q. Just the conversation you had with whoever was in charge there.

A. Yes—Schultz. I told him we had to muck out up there or quit work. He said, "Well, what are you going to do?" And I told him, "I propose that you put a few boards over your bottom here that you have constructed here, that you call a flume, and let us muck out, which we will keep on doing until we have mucked out, and then you can take them

(Testimony of F. J. Wettrick.)

away and [563] you can go on with your work, and we will do that from time to time as we need to muck out," and he said, "Well, I don't know." If I remember rightly, I think that is what he said.

Q. Did you have any conversation with Kennedy?

A. No, I did not. I didn't see him that day, I don't think, except from a distance, or the day before—I don't know. I forget when it was I saw him.

Q. Did you have any conversation with him at all about dumping the muck down there over his flume-line that he was building?

A. Not with Kennedy; no.

Q. Did you have any other talk with this man in charge of the labor, Schultz?

A. Yes. He walked down the flume with me some distance and I had a talk with him and told him it was not our intention—these were the words I used—"It is not our intention to hinder you in your work or destroy your flume; all we want to do is to prosecute our work with diligence." That is all we ever wanted to do.

Q. Did they put any boards over the flume so you could muck out? A. No.

Q. What did you do concerning keeping in progress this work of the Ebner Company that you were put in charge of, in the way of running this tunnel on this claim?

A. This was eleven o'clock, and I told him that the men would absolutely have to muck out this evening, and we would give him until three or three

(Testimony of F. J. Wettrick.)

fifteen to make some provision by which the muck could continue to come down there as it was before—either put boards over or do anything they wanted [564] to. I told him at 3 or 3:15 our men had instructions to muck out, which instructions were left with Reardon and Maloney and I came downtown.

Q. And you came downtown? A. Yes, sir.

Q. What happened then?

A. Up by the tunnel, you mean?

Q. Yes.

A. The mucking continued as I instructed it was to be done—commenced, as I had instructed, at 3:15 as they told me afterwards—about a quarter past.

Q. I want to direct your attention to what took place, if anything, in regard to any arrests that were made afterwards—was it that day or the next day you and these people were arrested—that you had the talk with Schultz? A. It was the next day.

Q. Did you have any other conversation with anyone in charge of the defendant company's work up there before you were arrested about dumping?

Same objection.

By the COURT.—You can direct his attention to some particular men.

Judge WINN.—I don't know whether he did or not.

The WITNESS.—Only in so far as the conversation with Jones in the commissioner's court here is concerned.

Q. With Jones, in the commissioner's court?

A. Yes, following the arrest of Reardon and Ma-

(Testimony of F. J. Wettrick.)

loney. I appeared for them in the early morning and entered the plea of not guilty, and I believe that Jones was there at that time. The conversation did not relate with any particularity [565] to the boards or flume, but I simply reiterated what I told to Schultz.

Q. You appeared in court for yourself and the other defendants. Who appeared there, if anyone, to prosecute the cases that morning?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Plaintiff allowed an exception.

Q. I will ask you if anyone from the United States district attorney's office, Mr. Rustgard or Judge Folsom or any one of his deputies, appeared there or did someone appear as a private prosecutor?

Objected to as incompetent, irrelevant and immaterial and not the best evidence.

By the COURT.—I don't think this has been shown in this case. He may answer.

Defendant allowed an exception to the ruling.

A. Mr. Bayless and Mr. Hellenthal, Si Hellenthal. were there.

By the COURT.—Did you answer that Mr. Rustgard or Mr. Folsom were not there?

A. I answer that they were not there, from my recollection.

Recess to 2 P. M.

(Testimony of F. J. Wettrick.)

Afternoon Session.

Continuation of the direct examination of Mr. WETTRICK.

(By Judge WINN.)

Q. At the time that you were in charge this property up there in the absence of Mr. Mackey, did you ever appeal to the United States marshal to go up there and make any arrests of anybody?

Objected to as incompetent, irrelevant and immaterial and not the best evidence.

Objection sustained. Plaintiff allowed an exception. [566]

Q. Did you or anybody under you ever come around here to swear out any complaints to have any of these opposing parties arrested?

Same objection. Objection sustained. Plaintiff allowed an exception.

Q. Did you see this deputy Lund, this Deputy Marshal Lund up there? A. Yes, sir.

Q. What day did you see him up there?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. I saw him there frequently during the month of October.

Q. During the month of October? A. Yes, sir.

Q. Who was he with when he was up there generally?

Same objection. Objection overruled. Defendant excepts.

(Testimony of F. J. Wettrick.)

A. I saw him occasionally in the cabin by the road up there at the Ebner mine.

Q. Did he give you any orders?

A. No, he did not.

Q. You heard Reardon's testimony this morning—you don't know anything about those conversations he had with Reardon?

A. No, I do not, personally.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. Where was your watchman's cabin—did you have a watchman's cabin up there?

A. We had buildings around the mine.

Q. Lund stayed with your people part of the time?

A. He stayed in our cabin occasionally when I saw him.

Q. When the weather was bad? [567]

Q. He was up with Captain Martin—both of them were from the marshal's office as you understood it?

A. Both of them were up there—I never saw both of them there at the same time.

Q. Most of the time they were up on what is known as the Fraction Placer, near the end line of the Golden Fleece?

A. I never saw them there.

Q. I understand you to say that the first indication of entry on the part of the Alaska-Juneau people on the ground in controversy, the Parish and Lotta lode, was about the time of this first arrest?

A. I don't think I said that.

Q. Do you mean to convey that to the Court?

(Testimony of F. J. Wettrick.)

A. No; I don't know when that was exactly.

Q. You say you started your survey work on the high line flume of the California & Nevada Copper Co. people about the first of August?

A. About the first of August, yes.

Q. 1910? A. Yes, sir, around there.

Q. It was after Mackey and Mr. Bent had taken charge and superseded Mr. Tripp, wasn't it?

A. Yes, as far as I know.

Q. You are not exact about that date? A. No.

Q. If Mr. Tripp should say that he left the employ and turned the property over on the third of August, it was probably about that time or shortly afterwards? A. Somewhere about the first; yes.

Q. You were employed by Mr. Bent, were you?

A. Yes. [568]

Q. After his arrival here? A. Yes.

Q. Now, when you were employed there, you took charge of a proposed survey for a patent of the Parish #1 and Parish #2 lode claims?

A. During the course of the year's work, the two or three months' work; yes.

Q. About what time was it your attention was first directed to that particular work?

Judge WINN.—Did you understand the Parish #1? A. No, Number 2.

Mr. SHACKLEFORD.—The Parish Number 1 and 2—on the question of surveying and doing the work for a patent on the Number 2, didn't you survey the two claims together? A. No.

Q. Didn't you ever survey the Parish #1?

(Testimony of F. J. Wettrick.)

A. I surveyed the extension lines; yes.

Q. Did you do any work on the Parish #1 or have any work done under your supervision?

A. No, sir.

Q. You did survey last fall the Parish #1 there?

A. Part of it.

Q. Part of it as already patented?

A. No, I surveyed part of it. I surveyed as much of it as was necessary to extend the side lines of the Parish #1 some distance up the hill.

Q. You have not surveyed the Parish #1 for patent—the remaining unpatented portion of Number 1 Parish? A. No.

Q. And you haven't done any other work on the Parish #1 under [569] your supervision?

A. No, not under my supervision.

Q. Your idea in starting what is known as the upper tunnel which is above the Alaska-Juneau flume-line was to complete the assessment work by developing the ore body on that claim from there; is that right?

A. It was to do development work on the claim; yes.

Q. And as a deputy mineral surveyor you have to certify that the work is development work, directed in good faith toward the development of an ore body, don't you?

A. That is about the oath that you make. Of course, it does not necessarily have to be applied to the uncovering or driving of a tunnel, it might be other work that might be necessary in order to facili-

(Testimony of F. J. Wettrick.)

tate the general work.

Q. As long as you are driving a tunnel it is supposed to be directed toward the development of an ore body on the claim?

A. That is the intention; yes.

Q. And when you survey a claim for patent, you certify to it—that it is a mineral claim and that the work on it is done to develop the claim as a mineral claim?

A. I certify that so much development work is done—the definition of that is left to—

Q. It is a matter of law? A. Yes, sir.

Q. Now, underneath the line of the Alaska-Juneau flume there was already a tunnel? A. Yes, sir.

Q. Far enough down so that the flume did not interfere with getting into that lower tunnel?

A. It was below the tunnel. [570]

Q. What ore body or indication led you to start the development work on the upper tunnel in the place that you did?

A. There was a very plain quartz stringer there.

Q. White quartz? A. White quartz.

Q. As to its value you don't know? A. No.

Q. You don't know whether it bore gold or the other precious metals named in the mining statutes of the United States or not?

A. Well, it had the ore that is commonly found in that section bearing gold; yes.

Q. Do you know whether it bears gold or not?

A. I never had it assayed. I did it by comparison with other rock.

(Testimony of F. J. Wettrick.)

Q. Did you see any gold in it?

A. No, I didn't see any free gold.

Q. Did you pan it? A. No, sir.

Q. Do you want to make a statement to the Court now that that development work was done on a stringer carrying precious metals?

A. I say it was done on a stringer that compared favorably with other rock found in that country that does bear gold.

Q. How does it compare—simply that it was white quartz, that is all, wasn't it?

A. It had the same characteristics as lots of other quartz has up in that country.

Q. You don't want to make the statement, however, that it was an ore-bearing quartz?

A. No, I don't, because I didn't have it assayed to show it myself. [571]

Q. You selected a place which is marked here so as to show that it is on a steep hillside. Come here a minute. The place marked "tunnel" in the vicinity of the word "flume" on the right-hand side of the creek looking up, is what is known as the upper tunnel? A. Yes, sir.

Q. And this contour or alleged markings there are made to indicate it is on the edge of a bluff, isn't it—feather marks? A. No, that is part of the dam.

Q. It was immediately over the proposed right of way of the Alaska-Juneau flume?

A. It was above the Alaska-Juneau flume, about forty feet.

Q. And almost immediately over it—that is, it is

(Testimony of F. J. Wettrick.)

very steep at that place? A. Yes, sir.

Q. So the dump would naturally fall on it?

A. Naturally.

Q. What were your instructions, other than the ones you have recited, with reference to any strategic work that you were to do up there in connection with this contest for a water right?

A. I don't recall any specific instructions that sounded like stratagem or anything like that.

Q. Had you any instructions other than to survey the claim for patent and do this work?

A. That is about it.

Q. You want the Court to understand that you were up there in ignorance and without any intention of interfering in any way with the development of the proposed water right of the Alaska-Juneau Company?

A. I had no instructions to do anything to interfere with your work nor was that my intention when I had charge of it. [572]

Q. Now, you never had any conversation with any of the men connected with the Alaska-Juneau Company about what you should do under such circumstances, did you?

A. I was not in the habit of taking instructions from the Alaska-Juneau men.

Q. I didn't mean the Alaska-Juneau men. The California & Nevada, I mean.

A. The instructions that I got were to continue the work when Mr. Mackey left, as outlined, as diligently as I could.

(Testimony of F. J. Wettrick.)

Q. What conversation did you have with them with reference to this contest that was going on with reference to this right of way up there?

A. I don't remember that.

Q. You say you didn't have any with specific reference to the contest?

A. With specific reference to the contest? None, that I remember—we had other work to do rather than to discuss stratagem.

Q. Now, you knew about where that flume-line was going to go when you located that tunnel, didn't you?

A. When I located that upper tunnel?

Q. Yes.

A. I don't believe I located that upper tunnel. When I had charge of that open cut work or the tunnel was already started.

Q. Already started? A. Yes.

Q. Then, you were not the man that established the place there for the purpose of further developing the claim? A. Not at that particular place; no.

Q. And it was not your judgment that chose the stringer you [573] are mentioning as the point for development? A. I didn't direct that.

Q. Who did do that, do you know?

A. I don't know. As I said, I took charge—I continued the work as handed over to me.

Q. But any work that was done in those tunnels was done on the recommendation of yourself and Lloyd Hill to Mr. Mackey, to have more work, in order to have sufficient evidence to secure a patent under the mining laws of the United States, wasn't

(Testimony of F. J. Wettrick.)

it? A. Not exactly that way.

Q. Then, Mr. Mackey is mistaken if he said that it was done under your recommendation?

A. If you want me to explain, I will, as to how that was done.

Q. I will ask you if the firm of Wettrick & Hill told him to have the work done?

A. We told him to do more work on the claim; yes.

Q. Now, who located that as a working place, that is what I wanted to know? Do you know?

A. No, I do not.

Q. Can you give me any light on the subject at all?

A. I can't do it definitely; no.

Q. When was it you had this conversation with Mr. Mackey about having more work done on that claim—before he went south, wasn't it?

A. Yes, some time before that. I don't remember exactly.

Q. Either August or the early part of September?

A. It must have been somewhere around the latter part of September, or first part of October. I don't remember exactly—that plan was discussed from time to time, the general plan.

Q. The work on those two tunnels, the lower and upper tunnel, [574] on the Parish #2 was started after the hearing for the temporary injunction down here, wasn't it?

A. I am not certain about that.

Q. Well, it was started after you knew that the Alaska-Juneau people had proposed to take a flume-line down that sidehill?

(Testimony of F. J. Wettrick.)

A. No, I don't know exactly when it was started.

Q. You don't know when it was started?

A. No.

Q. Well, if it was started subsequent to the filing of that first suit and the hearing on that injunction. it was started after you knew that the Alaska-Juneau people were going to take the water out somewhere in the vicinity of the Lotta or Parish claims along the sidehill in a flume to Snowslide Gulch?

Objected to as argumentative. Sustained.

Q. Now, as a matter of fact when did you first learn of the intention of the Alaska-Juneau people, while you were connected with this property—you were working on the property in different places all that summer and fall, were you not, after Mr. Mackey left? A. At intervals, yes.

Q. Now, when did you first learn that the Alaska-Juneau people proposed to take the water out of Gold Creek at a point somewhere on the Parish or Lotta lodes and take it down along the bluff side to Snowslide Gulch by flume?

Same objection. Objection overruled. Plaintiff allowed an exception.

A. By actual observation, do you mean?

Q. Yes.

A. I don't remember exactly. I know that I went down to the [575] creek during August some time and saw a location notice posted there in a trough. I don't remember exactly when that was. I think the testimony of mine given in that injunction hearing as to when that date was—

(Testimony of F. J. Wettrick.)

Q. Well, before the 31st of August you not only knew that they had posted a location notice, but you knew they had constructed trails across the Parish lode on to the Lotta lode, over the Taku Queen and constructed a cabin on the Cape Horn claim?

A. Yes, they were going all over the claims there.

Q. And that was before the 31st of August?

A. I believe so, yes. There wasn't anything definite there that I remember in the early part of August as to where they were going to put their flume, nor where they expected to put their dam; that was a mere supposition on my part, I think.

Q. I will ask you to refresh your recollection. I will ask you if it is not a fact that prior to the 31st of August you found existing upon the ground—that you found by actual measurement prior to the 31st of August, 1910, that the notice of water location posted by L. D. Mulligan is within the boundaries of the Lotta lode claim owned by the plaintiff, etc., and other matters stated in your affidavit.

A. I just answered that question the same way.

Q. The same way you did when you made your affidavit?

A. Yes, your previous question. I told you they were all over that claim and the notice was posted up there some time during August.

Q. You also know that a tunnel was started prior to that time on the Parish #2 lode by the Alaska-Juneau people?

A. During the month of August?

[576]

Q. Yes.

A. Yes, I saw it from the road.

(Testimony of F. J. Wettrick.)

Q. How far above the present grade of the Alaska-Juneau flume is that tunnel?

A. It is a matter of 18 or 20 feet, I think. I don't remember exactly—I don't think I got the difference in the elevation.

Q. Approximately that?

A. I would judge so. As I remember the location of the two tunnels, I rather think it is less than that.

Q. When did you finish your survey for the high line flume? A. The preliminary survey?

Q. Yes.

A. I don't remember. Very likely it is in my note-book.

Q. I wish you would look that up and let me know. Do you know when you finished your regular survey for that flume by making the flume-line on the ground?

A. The preliminary survey—that is what I had reference to. I was frequently on the grade and re-establishing the grade stakes and re-ran it once or twice.

Q. And after the preliminary survey was made there was some changes made in the position on the ground as there is in railroad and other surveys—after the preliminary survey was made?

A. Just the little change due to the slight difference in the grade that was finally chosen.

Q. In the elevation of the grade?

A. Yes; that was finally chosen.

Q. About this Ebner mine tunnel which you spoke of here, when you went to establish that point, wh

(Testimony of F. J. Wettrick.)

did you find there with reference to a tunnel having already been started? [577]

A. There is a tunnel faced up down there near that point—lower than that.

Q. Lower than this point? A. Lower.

Q. That is Mr. Tripp's tunnel, as you understand it?

A. Yes, I know Mr. Tripp had that work done.

Q. So the proposition of changing the place of the tunnel—this new tunnel was substituted for that as the entrance to the working tunnel of the Ebner mine?

A. Yes, sir.

Q. I understand you that each of these tunnels, the lower and upper tunnel on the Parish #2, as to this work in 1910, measured 32 feet each?

A. That is the measurement I have; yes.

Q. Is that the measurement after the entrance into the hillside or from the first place where the ground is broken in the open cut that approaches the tunnel?

A. No; I believe that is the measurement from the point which is the mean between the point where the ground is first broken and the point where you go into the tunnel.

Q. How much actual overhead is there in that upper tunnel—how much actual overhead?

A. I wouldn't know about that. I imagine about 28 feet or so, probably less or probably more.

Q. What is the difference in elevation between the Alaska-Juneau flume as at present located and the mouth of the tunnel, known as the upper tunnel on the Parish #2 lode?

(Testimony of F. J. Wettrick.)

A. I can give it to you approximately. I didn't determine it accurately. About forty-five or fifty feet.

Q. Has the debris or dump at the mouth of that working formed a kind of a level place or platform?
[578]

A. Where? At the mouth of the tunnel?

Q. At the mouth of the upper tunnel?

A. No, not to any extent; it is a little steep there and falls down the hillside immediately.

Q. Do you know how much of an open cut there is to that tunnel before you get to the overhead?

A. That is from the place where the ground is first broken to the place under cover?

Q. Yes.

A. No, I do not exactly, but I think it is somewhere around eight feet—six or eight feet.

Q. You counted the work done during the year 1910 on the roadway leading from the Basin road to the compressor plant as part of the legal assessment work in making your patent returns?

A. I mentioned that—put that in under my list of improvements.

Q. When was that work done?

A. That was done some time ago. I don't know.

Q. It was not done in 1910? A. No.

Q. It was done in 1909?

A. That road? No, that is an old road—that was done when the chute was built.

Q. You are counting the whole road as worth \$100?

(Testimony of F. J. Wettrick.)

A. No, I have counted it more, I think—did I say \$100?

Q. I understood you to give the value of the rock work as \$960 and the total value of the work as \$1060?

A. If I stated that, it must be the way it is.

Q. So you were counting the original construction of the road in computing the assessment work, instead of counting the repair that had been done on it during the previous year? [579]

A. Rather, both. I am not so particular about actual figuring up what the cost of building a road like that is, when I have so much actual tunnel work on it.

Q. You didn't make the original computation then as to how much more work had to be done on that—you only made the return after you made the survey?

A. I didn't make any computation about how much work was to be done.

Q. Did you survey the property for patent before or after the work had been done in the upper and lower tunnels in the Parish #2? A. After.

Q. You know as a matter of fact that—this map was prepared by you and Hill in collaboration?

A. Under my direction, partly.

Q. You know as a matter of fact that that branch road from the Basin road doesn't start on the Parish claim at all, don't you?

A. It starts exactly where it is shown there, on the end line of the—

Judge WINN.—What is that?

Mr. SHACKLEFORD.—The branch road to the

(Testimony of F. J. Wettrick.)

compressor plant, from the Basin wagon road.

The WITNESS.—It is practically where it is shown, practically on the end line of the Forrest lode, where it branches off.

Q. It starts off the Forrest lode?

A. The end line of the Forrest lode is shown there and I think it goes right across the deflection from the main road on this sidehill. It may be a few feet inside.

Q. The Forrest line is about 6 feet to the right-hand side of [580] the Parish lode at that point as you look up the creek—6 feet to the inside of the Basin wagon road at that point, on that point at the right-hand side of it, looking up the creek.

A. Please state that again.

Q. At the place where this branch road from the Basin road branches off to the compressor plant, the Basin wagon road is about 6 feet in the Forrest claim and is not in the Parish claim, is it?

A. The Basin road traverses along the Forrest claim there as shown.

Q. And at that point the Basin road doesn't touch the Parish claim?

A. The Basin road does not, no—I believe not. Six feet? I wouldn't say that was 6 feet; it depends entirely upon what point you take as to where the road deflects—when you have got a six or eight feet road.

Q. I mean anything you would describe as the road if you were measuring it, putting it on the map.

A. I don't know whether it is 6 feet off or two feet

(Testimony of F. J. Wettrick.)

or right on it. I think it is right on it.

Q. The Forrest lode is not a part of the Ebner group of properties, is it?

A. Not to my knowledge.

Q. I understand you do not know who it was that originally told Mr. Mackey that he must do some more work on the Parish #2? A. Did I say that?

Q. Do I understand you to say that?

A. I don't know who first told him—I talked to him about it myself. [581]

Q. Now, how much work has to be done under the law to entitle the claimant to patent?

A. \$500 worth.

Q. And you had charge of the work and you insisted on keeping on until you were able to compute \$1,060 before the work was stopped?

A. No, that was not the idea that I insisted on having \$1,060 worth of work done.

Q. Did you tell them when to stop?

A. Not as I remember.

Q. Do you remember how the work came to be stopped?

A. It may be I told him I wouldn't drive any more or needed the men elsewhere. I don't remember just exactly what the conversation was.

Q. Do you remember any conversation at all about it?

A. I remember some conversation about doing some more work on the claim; yes.

Q. I am talking about the time the work was stopped.

(Testimony of F. J. Wettrick.)

A. I don't recall now any conversation on that point.

Q. Well, the work was started and you just let it run along? A. That is about the size of it.

Judge WINN.—He had nothing to do with letting it run along.

The WITNESS.—While I was in charge I continued the work.

Q. How far had you gotten in when you left control of it? A. On the upper tunnel?

Q. Yes—on either tunnel?

A. I don't remember, something like twenty feet or so. I don't remember exactly.

Q. Did you make any investigation as to the continuance of the lower tunnel, as to whether it would develop any ore body? [582]

A. I was in it; yes.

Q. I mean before you had the work started in that place? A. I had not; no.

Q. You don't know anything about the value of any particular spot on that ground with reference to drawing the development work to it?

A. Not by reason of anything it assayed myself; no.

Q. I understand that if either one of the parties to this action had seen fit to have erected a platform or built boards over that tunnel, there would not have been any interference with each other—so as to dump out beyond the place where the Alaska-Juneau people were working?

(Testimony of F. J. Wettrick.)

A. I can't say what would have happened from their people but there would not have been any trouble from ours, because all we wanted to do was to get the muck out of the tunnel, so they could drive some more.

Q. But you were anxious at that time to have them make a confession that it was necessary in order for them to do any work on that claim to protect you?

A. No, that wasn't the idea.

Mr. SHACKLEFORD.—That is all.

(By Judge WINN.)

Q. In making surveys generally for patent, I will ask you if there is anything in your rules and regulations which requires you to make a return of all the improvements upon any particular mining claim as covering improvements for a patent?

Objected to as incompetent, irrelevant and immaterial and not the best evidence.

Objection overruled. Defendant allowed an exception. [583]

A. I don't remember anything, any definite instruction, where all the work has to be shown in detail. If you have enough work showing upon the claim, tunnel work, you state it and you say so, which you desire to apply on that particular claim. That I have done.

Q. Does it require all tunnel work in order to get a patent—do you understand that to be the law?

A. No, sir.

Q. Will you explain what you mean by that?

(Testimony of F. J. Wettrick.)

What other mining improvements would be considered?

By the COURT.—That is a matter of law.

Q. I will ask you if in your return, in testifying to Mr. Shackleford, if you attempted to give all the improvements in the way of assessment work that had been done on these claims.

Objected to as not the best evidence. Objection overruled. Defendant excepts.

A. No, sir, I did not testify that I made a return of all the work upon the claim and I didn't want to necessarily leave that impression.

Q. I will ask you, Mr. Wettrick, as to whether or not you consider the stripping of a vein and removing the earth and such work as that, work that would count on patent work?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Plaintiff allowed an exception.

Q. I will ask you to state briefly to the Court what kind of work you consider necessary to be done on a claim in order to report that \$500 worth of work has been done in order to obtain patent?

Same objection. Objection sustained and plaintiff allowed an exception. [584]

Q. What do you consider as work that tends to improve and develop a mining claim so as to make it count on the work that is necessary for the \$500 worth, to obtain a patent—what kind of work?

Same objection. Objection sustained. Plaintiff allowed an exception.

(Testimony of F. J. Wettrick.)

Q. Have you any explanation to make about the work you found on this claim, as to what you counted in and what you did not count in and what you hunted for and what you did not hunt for?

Mr. SHACKLEFORD.—We object as not proper redirect examination and reserve the right to move to strike.

Objection overruled.

A. There was work upon the claim—that evidently had been done upon the claim, that I did not list in my returns as improvements, development work, because I saw that I had enough actual work done by tunnel work and open cut work, so that I did not have to hunt up and measure up the Borean placer pit and the smaller coverings of the veins over the claim; just that plainly visible and easily determined work that was done upon the claim we took.

Q. Did you have any conversation with Mr. Mackey—I couldn't understand and didn't follow you definitely, whether you did have a conversation with Mackey—about the work on the Parish No. 2 claim?

By the COURT.—You are referring to the same conversation brought out by Mr. Shackelford?

Judge WINN.—Yes, sir.

Objected to as not redirect examination. Objection sustained. Plaintiff allowed an exception.
[585]

Q. Did you have any conversation with Mr. Mackey about the amount of work, etc., he should have done on this Parish #2 claim?

(Testimony of F. J. Wettrick.)

A. Yes, we talked it over.

Same objection. Objection sustained. Plaintiff allowed an exception.

Q. Mr. Shackleford questioned you something concerning a water notice that was posted by Mulligan. Where was this water notice that you saw up there posted, on what claim? A. On the Lotta.

Q. About what place on the Lotta claim—can you describe it to the Court?

A. Yes; some 190 feet up the creek from the place where the lower side line, that is the southwesterly line of the Lotta, crosses the creek. About forty feet, I believe, below where this notice was posted at that time there were two troughs, triangular troughs, through which water was running and held down by stones.

Q. You say those troughs are how far up above the present dam of the defendant company?

A. Some 140 or 150 feet, if I remember exactly.

Q. What time, if you know, did they change the place to build a dam in regard to the hearing on the application for a temporary restraining order?

A. You say about what time?

Q. Yes, with respect to the hearing on the application for a temporary restraining order—what time did they come down the creek and commence to build a dam where they finally erected it?

A. I don't remember exactly the date. If I looked it up in my [586] note-book and found out the date of the hearing, I could tell.

Q. Do you know about what time they came down

(Testimony of F. J. Wettrick.)

the creek and commenced constructing the dam or commenced constructing the dam where they eventually did build it?

A. The exact date I don't remember, but it was some time during the latter part of September or first part of October—no, the latter part of September, I think. I was up there intermittently and I don't remember those dates so very well.

Judge WINN.—In looking over the papers in this case with the idea of coming to a conclusion of our case soon, I find that I have not had Mr. Ebner verify this answer yet and I shall wish to strike out some portions of the answer that I indicated to the Court at the time I read the answer over, by reason of having eliminated from the complaint the Cape Horn claim. At the time I offered to file the answer here I stated I would have to await Mr. Ebner's arrival before verifying the pleadings, and also stated in my opening statement to the Court that I desired the answer to conform to the pleadings as they are after we struck out or left out that cause of action pertaining to the claim. * * * I want the pleadings straightened out to make it conform to all this testimony as to where these claims are located.

Mr. SHACKLEFORD.—With reference to your application for amendment, I would like to have it made a matter of record * * * that the Cape Horn claim is the property of Mr. Ebner and not the property of the Ebner Gold Mining Company. I desire to have that admission in the record as the admission you made.

(Testimony of F. J. Wettrick.)

Judge WINN.—That is right. We dismissed that part of the complaint for the reason that upon investigation I had found out that Mr. Ebner held title to that claim—the Cape Horn [587] lode. Is it the Cape Horn or the Cape Horn #1—whichever it is in the complaint.

Mr. BURTON.—The Cape Horn #2.

Q. I believe Mr. Shackelford asked you the question whether or not you advised Mr. Mackey that there would have to be some more work done upon the Parish #2 lode claim before application for patent was made—did you ever advise Mr. Mackey anything of that kind?

A. We had conversations about that, looking toward the acquisition of title to the Parish #2, and I remarked that it would be better to have some more tunnel work done upon it because of the fact that some of the other work had been caved in a little bit as is the habit there, some of the ground would not show up plain enough, and that I wanted to be sure that there was enough visible and permanent work there so my return would be right.

Q. Is there or is there not any surface ground of those claims there subject to slides? A. Yes, sir.

Q. Now, I will ask you, Mr. Wettrick, whether or not the mere fact that these people were running around over this property up there and attempting to build trails and do work, whether the fact that there was a contest on hand had anything to do with your requesting that the work show up properly on these claims in order to make application for patent?

(Testimony of F. J. Wettrick.)

Mr. SHACKLEFORD.—We object to that as leading, incompetent, irrelevant and immaterial.

Objection sustained as leading.

Q. Were there any other reasons why you advised this tunnel work that you speak of?

Same objection. Objection overruled. Defendant allowed *an* [588]

A. No specific reasons that I remember why I advised it—I don't remember my mental operations, exactly.

Q. Did you know at that time that these other people were building trails and doing some other work on the property?

A. Yes; I might have been influenced by the fact that I wanted to be sure if any controversy did arise that I could certify to work upon the claims that would stay there—would not be caved in or washed away.

(By Mr. SHACKLEFORD.)

Q. As a matter of fact, if the work was valid assessment work, whether it caved in or had not caved in, if you had proof of it, you could get your patent?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial and improper cross-examination.

Objection overruled. Plaintiff allowed an exception.

A. Yes, if you can measure it up and make the proper returns, but if it were caved in, you couldn't measure it up.

Q. Suppose you didn't measure it up. Suppose

(Testimony of F. J. Wettrick.)

you had your affidavits of the work?

A. You could get your patent just the same; yes.

Q. With reference to that, you made no return?

A. About any work having caved in? No, did not have to.

Q. And all you have to say about it on this examination is that the property is subject to slides?

A. Yes.

Q. But you had to make a certificate under oath that a certain amount of work had actually been performed on that ground? A. And describe it.

Q. In order to satisfy yourself completely about it you asked them to do this work? [589]

A. I remarked that some more work had better be done, so it would be visible and permanent there when I made my returns.

Q. That was to satisfy yourself about it and protect you in making your oath?

A. That was largely it.

Q. Has application for patent been made for the Parish?

A. Certainly not. Application for patent cannot be made until the survey is finally accepted by the surveyor general. The survey was transmitted to the surveyor general's office on April 20th and the surveyor general's office has not yet got to it.

Q. (By Judge WINN.) You completed the work as far as you know—it was just sent back for correction.

A. Certainly; my work is all done in connection

(Testimony of Fred M. Ridell.)

with it—the rest of it is attorneys' work.

Witness excused. [590]

[Testimony of Fred M. Ridell, for Plaintiff.]

FRED M. RIDELL, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. When did you come to Alaska?

A. The 11th of September, 1910.

Q. You know Mr. Mackey? A. Yes, sir.

Q. Did you go up on this Ebner property some time last summer to do some work?

A. Yes, the 13th of September, 1910.

Q. What were you doing up there?

A. Working on the flume grade intake, starting there.

Q. That was the high line flume?

A. That was the high line flume.

Q. I will ask you, do you know where there is a line brushed out from an old cabin on the left-hand side of Gold Creek as you go up the creek, and brushed on down through the creek and practically across the creek and up to the wagon road?

A. Yes, sir.

Q. Did you have anything to do with the brushing out on that? A. Yes, sir.

Q. Did you know a man named Hunsucker up there? A. Yes, sir.

Q. Who was Hunsucker?

A. He was the watchman for the property.

(Testimony of Fred M. Ridell.)

Q. I will ask you if you know anything about a road being built and a notice being posted up down on the road that leads from the regular wagon road to the Ebner ore compressor? [591] A. Yes, sir.

Q. Do you remember about the time that fence was built? A. Yes, sir.

Q. About what time was it?

A. I believe that fence was put up there about the 23d or 24th of September, somewhere around there.

Q. And when was the notice put up?

A. The notice was put up the day the fence was put up.

Q. Do you remember who put up the fence—do you know?

A. Middleton and myself and a man named Greenwood carried the boards to the fence and Hunsucker was waiting for us and we put up the fence.

Q. What was your object in putting up the fence?

A. The idea of the fence and notice was to keep people off the property.

Q. Who did you think was coming on the property?

A. I don't know. There was simply a notice put up to keep people off.

Q. Now, at the time you put up that fence and put up the notice had Kinzie's people put any lumber or poles on any of the ground?

A. They had put some two-inch planks up on the road, about ten of them—right on the main wagon road.

Q. Right opposite the road leading to the com-

(Testimony of Fred M. Ridell.)

pressor—that is where they had the planks then?

A. Yes, sir.

Q. Do you remember any time they brought any poles or logs down there? A. Yes, sir.

Q. When was that? [592]

A. That was about the latter part of September, I think, somewhere around there. I was working on this road at the time.

Q. Was it after that fence was put up or notice put up or before that they brought the poles?

A. It was after the notice was put up and the fence was put up that the poles were brought up.

Q. Do you know a fellow up there that lived in a little cabin down by the Snowslide Gulch by the name of Harry?

A. Yes, just know him by talking to him and knew his name was Harry.

Q. A lame fellow? A. Yes, sir.

Q. Did you ever have any talk with him as to whose employ he was in?

A. Just simply when I was working on the mill grade. After the first of October I used to have the job of bringing up all the dull steel and take it to the tool place or to the blacksmith-shop—we didn't have any on the mill grade, and I had a conversation with him on the Cape Horn concerning the property the people were working on.

Q. Did he tell you that he had been instructed by Kenzie to make certain investigations on some mining property up there and report to Kenzie about it?

Mr. SHACKLEFORD.—We object to that as in-

(Testimony of Fred M. Ridell.)

competent, irrelevant and immaterial and hearsay. Whoever Harry was, there is no evidence here that he was connected with the corporation in such a way that the corporation was bound by what he said.

By the COURT.—The objection will be sustained. You may make your offer. [593]

Judge WINN.—We wish to prove that Mr. Ridell had a talk with this man Harry, in which conversation he stated to Ridell that he had been sent up there by Kenzie to look over the Parish #2 and to find out whether in his (Harry's) opinion the assessment work had been kept up on it, and that Harry reported back to Kenzie that it had been, and Harry said he did not know why it was that he was kept up there to go ahead and do the work but that he was ordered to do so by Kenzie.

Offer refused. Plaintiff allowed an exception.

Q. Were you ever upon the claim down there about where this line was brushed out on the Parish #2 when any of Kenzie's people came up?

A. Yes, sir.

Q. What day was that?

A. That was about the 27th of September. Mr. Hendrickson brought down three or four men there, I believe it was, had about three men and had picks and shovels and they started to go down the creek. I was given orders by Mr. Black, who was then the foreman, that if anybody came to work on the property to go and tell him, which I did, and I went up and told Black, and Hunsucker was over in the old Ebner boarding-house and Mr. Black he went down

(Testimony of Fred M. Ridell.)

the road and Hunsucker and I went down by the compressor, went down the creek and they were there starting to pile up boulders. That was the first time they came there to work, and Hunsucker told them where they were working was patented ground and to leave it, which they did very peaceably.

Q. Was that the only time you were there when they were ordered off? [594]

A. That was the only time.

Q. You were not there when this skirmish took place on October third?

A. No, I was down on the mill grade, the first of October.

Q. And you were not there the day Wettrick and these gentlemen were arrested? A. No.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Was that the first time you had ever been up anywhere on that ground—on that grade?

A. That was the first time I saw them down on the creek.

Q. You don't mean to say that was the first time you were there.

A. That is the first time I saw them right there on the creek.

Q. I understand it was the first time you saw them there? A. In this one particular spot?

Q. Along that grade?

A. At this one particular spot I am talking about

(Testimony of Fred M. Ridell.)

—I am not talking about the flume grade or anything else.

Q. You saw them on the flume grade before that?

A. I saw them working on the flume grade when I first went up there.

Q. That was the first time you saw them at that particular place?

A. At that particular point, yes.

Q. They might have been there when you didn't see them?

A. They might have been there night-time, any day, when I didn't see them.

Q. There were lots of times when you have been there when you didn't see them?

A. Certainly. [595]

Q. Where were you at that time and what were you doing?

A. I was working on this little branch road that came off the main wagon road—I was widening out the road, fixing it up, taking trees and rocks off of it.

Q. When did you commence there?

A. I commenced there in 1910, about the 22d, or about the 23d or 24th of September—somewhere around there. I don't know the exact date.

Q. About the 23d or 24th of September when you went to work on this wagon road—you were working on the flume up on the hill?

A. I worked there and all around there. I did general all-around work.

Q. Where were you before you went to work on this road? A. I was working on the flume grade.

(Testimony of Fred M. Ridell.)

Q. When you were on the flume grade you couldn't see what was going on on the other flume of the Alaska-Juneau? A. No.

Q. So you don't know what happened there before you went on there on the 24th? A. No.

Q. And you didn't see anybody between the 24th and the 27th? A. About that.

Q. And about the 27th at this particular point—

A. At this particular point I am talking about.

Q. And about the 27th you saw Hendrickson and two or three men working there?

A. Yes, sir.

Q. And you have told how Hunsucker came down?

A. Hunsucker and I came down.

Q. And told them they were on patented ground?

[596]

A. Hunsucker was watchman—he told them, he served them the notice.

Q. And they went away and afterwards came back again? A. I don't know anything about that.

Q. You were not there after that day?

A. No, it was the next day that Mr. Mackey sent me down to the mill grade.

Q. And you don't know what occurred? A. No.

Q. What kind of a fence was this?

A. It was a regular common fence.

Q. Just one length of boards?

A. No, sir, we had three or four lengths of boards, —two posts set up, one at each end and had three boards run across and the cross-board ran from point to point.

(Testimony of Fred M. Ridell.)

Q. This fence was not an enclosure that enclosed anything? A. It enclosed that road.

Q. It was built across the road?

A. Yes, it was built across the road.

Q. There was a gate on the road?

A. This fence was on the road.

Q. There was a gate? A. No gate.

Q. The thing was boarded up? A. Yes, sir.

Q. How many boards?

A. We had two posts and three or four boards and had a cross-board that went from one point on the post to the other point.

Q. There were two posts—one on each side of the road? A. Yes, sir. [597]

Q. Those were the ones you put in?

A. Yes, sir.

Q. Then you put two boards, put them across?

A. No.

Q. How many boards?

A. Three or four boards.

Q. You took another board and nailed it to the post and laid it on the ground?

A. No; we nailed it from one point to the other, from the far point to the lower point of the other post.

Q. I mean outside the posts, that is between the posts you had the boards—there was only two posts?

A. Yes.

Q. And between the posts you had three or four boards?

A. Not between the posts. We had them across

(Testimony of Fred M. Ridell.)

from post to post.

Q. And then you nailed the board against the post—that is, the board was nailed on one end against the post, permitting it to run on the other end, on each side of the post? A. Yes, sir.

Q. And that fence was built immediately on the side of the Basin road? A. No, sir.

Q. How far from the Basin road?

A. I imagine one point was on the Basin road, likely, and the other point was about ten or fifteen feet from the Basin road.

Q. How long was the fence?

A. About fifteen feet, I imagine; somewhere around there.

Q. Now, this road you speak of branches off from the Basin road?

A. From the main wagon road; yes, sir. [598]

Q. You built the fence across that road?

A. Across here.

Q. It was parallel with the Basin road? A. No.

Q. One end was up the Basin road and the other shot off? A. Yes, sir.

Q. It was on that post you posted the notice?

A. Yes, sir.

Q. What day was that done?

A. Around the latter part of September, the 23d or 24th—somewhere around there. I don't know the exact date.

Q. You did some more work on that same road?

A. Yes, sir.

Q. While you were working there you saw men

(Testimony of Fred M. Ridell.)

working on the flume grade of the Alaska-Juneau Company? A. No, sir.

Q. Did you not at that time see men working along the grade there at different places?

A. No; they were down at the lower end, but I couldn't see on account of the hill blocking me.

Q. That was the reason you couldn't see?

A. Yes, sir.

Q. The work on the upper flume when you commenced there had just commenced?

A. The 13th of September I commenced to work there—Black was there before I was.

Q. The work had just commenced on the 13th of September? When you went up there?

A. No, Black was working before I did. I started to work there—Middleton and I, started on the 13th of September. [599]

Q. The preliminary survey had been made?

A. I believe it had been as far as I know—I don't know. I saw some stakes there which I presumed were for the grade.

Q. And that was the first you ever saw of the place? A. Yes, sir.

Q. You never saw any men there or anyone else—you were not up there in the Basin or on the Ebner property until the 13th of September?

A. Exactly.

Q. Before that you were away from there?

A. Yes, before that I was away from there.

Q. And that is the reason you didn't see anybody there? A. That is the idea.

(Testimony of Fred M. Ridell.)

Q. And the 24th is the day you went down there?

A. About that time. I don't know the exact date.

Mr. HELLENTHAL.—That is all.

Witness excused. [600]

**[Testimony of Angus Mackey, for Plaintiff
(Recalled).]**

ANGUS MACKEY, recalled:

(By Judge WINN.)

Q. Mr. Shackleford questioned Mr. Wettrick considerably about the time that work was commenced on the upper tunnel on the Parish Number 2 lode claim. Now, I will ask you if at the time the preliminary hearing came off before Grover Winn, when you were arrested, if there had been at that time any work done, either on the open cut that leads to the upper tunnel or on that upper tunnel?

A. Yes, there had been work done.

Q. I will ask you as to whether or not at the time of that hearing any understanding was had with Mr. Rustgard, the prosecuting officer present, and Mr. Hellenthal, who was representing Mr. Kenzie, and Mr. Burton who was representing your people, concerning as to whether or not you could continue work on that upper tunnel?

Mr. SHACKLEFORD.—We object to that as leading. May I inquire whether you are referring to the first arrest or the time of the injunction suit?

Judge WINN.—At the time Mr. Mackey was arrested. I want to show that at that time Mr. Hellenthal was there representing the Alaska-Juneau Company * * * it was not a part of the trial.

(Testimony of Angus Mackey.)

Mr. Mackey made the inquiry whether or not they could continue work on this tunnel up there without being molested and arrested and there and then Mr. Kenzie, there being represented by Mr. Hellenenthal, the prosecuting officer and Mr. Burton there,—it was understood they could go on and work there and dump as we have been dumping—just the thing that Mr. Shackelford has been questioning Mr. Wettrick about for such a length of time to show we moved up there [601] purposely to dump that stuff down there and disturb these people, etc. It is to show the good faith we have been in and to show the bad faith of these other people.

Mr. HELLENTHAL.—Judge Winn has not made any offer of proof that either Mr. Kenzie or myself agreed to anything. I want to say that neither Mr. Kenzie nor myself agreed to anything—I don't know what Mr. Rustgard agreed to and don't care. I didn't say a word about it and Mr. Kenzie didn't say a word about it, and the whole thing is merely in the imagination of counsel.

By the COURT.—Recite your offer.

Judge WINN.—I expect to show by Mr. Mackey that while Mr. Hellenenthal and Mr. Kenzie were present and in the presence of Grover Winn, in the presence of Mr. Rustgard, the district attorney, and Mr. Burton and perhaps someone else, I don't know, but that Mr. Mackey eventually asked the question whether or not he was going to be permitted to go ahead and do work upon the Parish #2 claim and in that tunnel that they had commenced, the upper

(Testimony of Angus Mackey.)

tunnel, the one which Mr. Shackleford questioned Mr. Wettrick about, and it was there and then understood between all parties, Mr. Hellenthal representing the civil side and Mr. Rustgard representing the criminal side and Mr. Burton representing our side, that we were to go on and work and dump out of that very same tunnel out of which the arrests subsequently grew of Wettrick and the other four people, and *it to* show that we were trying to go ahead and do the work that was necessary to open up and develop these claims without molesting these people.

By the COURT.—If you want to show that Mr. Hellenthal was representing Mr. Kenzie and the Alaska-Juneau, the defendant [602] company, agreed to such an arrangement as that you may go on and show it.

Mr. HELLENTHAL.—If there is no evidence that I agreed to it, it will be stricken?

By the COURT.—Yes, unless the defendant is connected with it the arrangement would not have any effect.

Last question read to the witness as follows:

Q. I will ask you as to whether or not at the time of that hearing any understanding was had with Mr. Rustgard, the prosecuting officer present and Mr. Hellenthal, who was representing Mr. Kenzie and Mr. Burton who was representing your people, concerning as to whether or not you could continue work on that upper tunnel.

Judge WINN.—Answer that by yes or no.

(Testimony of Angus Mackey.)

A. Yes.

Q. I wish you would state what took place there in the presence of the gentlemen I have just mentioned in my last question, the conversations.

Same objection. Objection overruled. Defendant allowed an exception.

A. Well, as well as I can remember, after the trial I asked Mr. Rustgard whether we would be permitted to work up on that tunnel on Number 2, that we wanted to do some more work on it and he said that there was nothing, that we could go right ahead and wouldn't be troubled—the only thing was we were to notify any people down below that we were going to blast.

Q. Was Mr. Hellenthal there? A. I believe so.

Q. And Mr. Kenzie? A. I think he was. [603]

Q. And Mr. Burton?

A. And Mr. Burton and Mr. Bayless, I believe.

Q. And that was the upper tunnel?

A. That was the upper tunnel.

Q. How much work, if you remember, had been done on that upper tunnel at the time this conversation took place and the time of your preliminary hearing before Grover Winn?

A. Well, we had just started the open cut at that time, I don't think we had gotten underneath, under cover—we were trying to get under cover. We might have been under cover, too; I don't know.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You started that work there somewhere after

(Testimony of Angus Mackey.)

the first of October, didn't you?

A. No, we started it in September.

Q. The latter part of September? A. Yes.

Q. And you drove a little open cut and faced up for a tunnel? A. Yes, sir.

Q. About this conversation before the commissioner—you asked Mr. Rustgard, you say?

A. Yes.

Q. Whether you would be permitted to go up there, whether there was any reason why you shouldn't go up there and continue that tunnel—that was the purport of your question?

A. Yes, sir, that is what I asked him.

Q. And what was Mr. Rustgard's reply?

A. Well, I couldn't exactly state his exact words.

Q. I mean the substance of it. [604]

A. We could go up there and work, that it didn't hinder our people going ahead with our work in the Number 2 tunnel, and we could work right straight along as long as when we blasted we give warning to the people below.

Q. As long as there wasn't anybody hurt?

A. Yes; as long as there wasn't anybody hurt.

Q. I didn't say anything about that and I wasn't in that conversation, was I?

A. I don't recollect—you were in the room at the time I asked, I think.

Q. I may have been in the room. A. Yes, sir.

Q. You don't know whether I heard anything about that? A. I wouldn't swear to it.

Q. You know, I didn't say anything about it one

(Testimony of Angus Mackey.)

way or the other.

A. No, I don't think you said anything to me about it at all.

Q. Or anybody else?

A. I don't know as I heard you say anything.

Q. Or Mr. Kenzie either?

A. I wasn't speaking to Kenzie about it.

Q. He didn't say anything about it?

A. In the open court, no—not in my hearing.

Q. Did anybody say anything but you and Mr. Rustgard?

A. I just asked the question of Mr. Rustgard.

Q. And he said there wasn't any reason why you should not—

A. No reason why we should not go ahead with our work.

Q. And that is all there was to it?

A. That is all. I didn't want to go in conflict with the law.

Q. You wanted to know what work you could do without putting yourself in the position where you would be prosecuted?

A. Yes, where I could be arrested. [605]

Q. And you asked the question of Mr. Rustgard for that purpose? A. Yes, sir.

Q. And he made the reply—

A. I asked the question for the protection of our people. We didn't propose to do work where we would get into the clutches of the law.

Q. And Mr. Rustgard made this reply to you and you took him at his word and went to work—that is

(Testimony of Angus Mackey.)

all there was to it?

A. Yes, he seemed to be acting for the 'Treadwell Company at the same time.

Q. You know he was acting as United States attorney?

A. He always called it our company—I know that Mr. Hellenthal.

Mr. HELLENTHAL.—I move to strike this testimony.

By the COURT.—The testimony, so far as having any bearing on the consent on the part of the defendant company is concerned, has no application and has no effect, but as bearing on the good faith of Mr. Mackey and on the questions attempted to be elicited by Mr. Shackelford—the answers, rather—it may stand for that purpose, showing he was not going back without it being known.

Q. Was there any conversation or discussion at that time about the dumping of the debris on the flume-line—I don't mean this particular time, but during the progress of this trial, with reference to the dumping of debris on the flume-line?

A. No, there was no flume-line there—there was no work done underneath us at that time.

Q. Not at that point? A. No.

Q. There was a question about rolling rocks and dumping debris [606] on the flume-line elsewhere? A. Up on the Lotta claim.

Q. Up right below where the dump is now?

A. Yes, that is the only place.

Q. The men were working at that time—the

(Testimony of Angus Mackey.)

Alaska-Juneau people—when this trouble occurred? They were working right near the place where the present dam is?

A. Well, they were working probably near Snowslide Gulch, that is, on the grade.

Q. On the first of October, on the grade, they were working up there, a gang of men?

A. But there was also some men working right below, where the present dam is.

Q. Along about the first of October?

A. You are speaking about the upper tunnel?

Q. No, I am speaking of the dam—along about the third or fourth of October, along about where the dam now is—that is true, is it not?

A. I believe there had been some start made up there somewhere on the site of the dam, but right underneath the upper tunnel there was nothing done.

Q. Underneath your upper tunnel the flume had not been laid at that time?

A. No, the flume grade.

Q. They were working at both ends and hadn't struck that point yet—they were working at the Snowslide Gulch end, towards that end and also at the upper end, and that tunnel is between those two points?

A. I wouldn't swear positively. I can't recollect whether they were working at the upper end, but they were down towards Snowslide Gulch. [607]

Q. You know what this trouble in October was caused by—the work on the upper end?

A. You mean the work on the flume or dam?

(Testimony of Angus Mackey.)

Q. In that neighborhood?

A. Yes; that is where the trouble started in. I thought you meant on the flume grade.

(By Judge WINN.)

Q. I will ask you if any more work was done on the upper tunnel on the Parish #2 after the arrest of Wettrick and others.

A. No, there was no more work done.

By the COURT.—This is in November?

Judge WINN.—Yes, sir.

Q. Why did you cease work there then?

A. I didn't want to get into any more trouble and didn't want the men to get into any trouble. I could see then the District Attorney had—

Judge WINN.—Never mind that.

Q. Did you have any place to dump?

A. Not without dumping over that ground, on account of the steep hill.

(By Mr. HELLENTHAL.)

Q. At that time or shortly after that an application was made asking for an injunction against the destruction of the flume at that point? Suit was brought by the Alaska-Juneau people against your people asking for an injunction, to enjoin you from destroying the flume at that point?

A. I believe so.

Q. And Judge Lyons made the order enjoining you from destroying the flume? [608]

Judge WINN.—I am going to offer in evidence the order of the Court and the papers in that case. Mr. Mackey doesn't know about that.

(Testimony of Angus Mackey.)

Q. Under the order of Judge Lyons you could have dumped there had you built the cover over the flume, could you not?

A. If we went to unnecessary expense; these other people ought to take care of their own flume, which I would have done if it had been me—I would have taken care of my flume.

Q. Judge Lyons permitted you to work there providing you covered up the flume?

A. I don't know.

Objected to as not the best evidence. Objection sustained.

Q. You could have worked there if you had covered up the flume.

Judge WINN.—That is conceded. If we had gone down on what they claimed to be their ground and gotten into trouble again, I presume we could have covered it over and worked there—we object to it. Objection sustained.

Q. You could also have built a platform extending out over the portal of your tunnel from the open cut, so you could have run your muck out over that platform and dump so as to clear the platform?

Objected to. Objection overruled. Plaintiff excepts.

A. Certainly, that kind of work could be done, but still at the same time, it was not our business to do that.

Q. That was the reason you didn't do it—because you didn't think it was your business to do it?

(Testimony of Angus Mackey.)

A. Certainly; it would put us to an unnecessary expense.

Q. It wouldn't be a great item of expense?

A. That is what your people think—that was the object— [609]

Q. That wouldn't be much?

A. Everything adds to those things.

Q. It wouldn't cost much to build that platform?

A. Not a great deal; no.

Q. The reason you did not was not because of the expense, but because you felt you should not be called upon to do it?

A. I did not care about taking any risk to get into any further trouble on the ground.

Q. You would not have gotten into any trouble if you built that platform?

A. I don't know. I wasn't very well satisfied in my own mind about that.

Mr. HELLENTHAL.—That is all.

Witness excused. [610]

[Testimony of Lloyd Winters, for Plaintiff.]

LLOYD WINTERS, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

(It is admitted by counsel that Mr. Winters is a qualified photographer.)

Q. Did you go up there to the Ebner mines yesterday? A. I did.

Q. In company with Mr. Ebner? A. I did.

(Testimony of Lloyd Winters.)

Q. And took some photographs up there?

A. Yes, sir.

Q. I will ask you if this is one you took up there (handing witness photograph).

A. Yes, sir.

Q. The objects shown on there are what—what is shown in that photograph?

A. In this particular photograph we showed the course of the waterfall and the dam on this lower right-hand corner.

The photograph is marked Plaintiff's Exhibit "U" for identification.

Q. I hand you another photograph and ask you if you took that? A. Yes; yesterday afternoon.

Q. Did Mr. Ebner tell you what particular objects he wanted to show on that picture? A. Yes, sir.

Q. What object is it?

A. The stake just across from the dam.

Q. Does it show the dam, too?

A. This old dam in the foreground and flume opposite the Ebner flume and the stake close to the flume.

[611]

Q. What dam is that—do you know?

A. I don't know that it has any name.

Q. Is it above the Ebner mill or below it?

A. Above.

Q. You don't know what stake that is claimed to be? A. Only what you see there.

(The photograph is marked Plaintiff's Exhibit "V" for identification.)

Q. Now, I hand you another photograph and ask

(Testimony of Lloyd Winters.)

you if that is one taken by you yesterday?

A. Yes, sir.

Q. What particular object did Mr. Ebner state he wanted to include in that?

A. The stake upon this little hill to the right.

Q. Is there anything else shown there?

A. The bridge in the foreground and this cabin.

(The photograph is marked for identification, Plaintiff's Exhibit "W.")

(By Mr. SHACKLEFORD.)

Q. Show me the stake on the picture.

A. The stake is indicated by an additional stake placed on the top, wrapped in white paper, so that it may be plainly seen in the photograph.

Witness excused. [612]

[Testimony of Ed Webster, for Plaintiff (Recalled).]

ED WEBSTER, a witness called and sworn in behalf of the plaintiff, testified as follows (recalled):

Direct Examination.

(By Judge WINN.)

Q. I hand you a picture which has been marked for identification, Plaintiff's Exhibit "W," and ask you if you have seen this picture before you came on the witness-stand?

A. Yes, I saw it last night at Winter & Ponds.

Q. I will ask you to point out to the Court any particular stake indicated on that map there that looks like a survey stake—do you observe one on there? A. I don't know which it is now I am sure.

Q. It is not marked, but it is a stake that is indi-

(Testimony of Ed Webster.)

cated up here? A. Yes, there is one there.

Q. That is the one?

A. That is what they said was a stake.

Q. Now, when you were on the witness-stand the other day you said something about a stake being up there somewhere near a cabin that was there when you left there, and you called it and designated it as one of the stakes, I think, at the intersection of some one of the Ebner group of claims with your millsite?

A. Yes, sir.

Q. Now, that stake just pointed out to you on this map, which we will mark "a," what about the relative position of that stake to the stake you testified concerning the other day, in that vicinity?

Mr. HELLENTHAL.—We object on the ground that the testimony sought to be elicited is incompetent, irrelevant and immaterial and that the Lotta claim is not tied to any monument or [613] other claim connected with this stake.

Objection overruled. Defendant allowed an exception.

A. That stake is just about as I had seen it, only I see by the picture here that the log cabin is gone—there is nothing but a frame building there; the log cabin stood right here (indicating).

Q. Put your finger on the post we are talking about.

A. Right there (indicating).

(It is marked "a.")

Q. Now, I wish you would indicate on this identified exhibit "W" of plaintiff about where the old log

(Testimony of Ed Webster.)

cabin stood that you testified concerning the other day? A. The log cabin stood right here.

Q. Put your finger there.

A. Right there (indicating).

(It is marked "b.")

Q. Now, I hand you another exhibit, which we have marked "V" for identification, and call your attention to a bridge and stake and we will have this stake marked afterwards "x."

A. That is the one that I said was across the dam from our dam, where we had the dam cross the creek on the hillside.

Q. Put your finger on the one you refer to.

A. Right there (indicating).

(It is marked "x.")

(By Mr. HELLENTHAL.)

Q. That stake on this last picture marked "V" shown you, is that the one you testified was from ninety to one hundred feet from the dam?

A. Yes, sir.

Q. Now, as far as this photograph is concerned, it would appear the same whether that stake had been moved fifty feet—it wouldn't make any difference in the appearance of the photograph? [614]

A. Not to my knowledge, no, but in my opinion that is just about where I seen it across from the dam.

Q. That is the way it looked to you?

A. Yes, sir.

Q. Had the stake been moved fifty feet as far as the appearance of the picture is concerned—it

(Testimony of Ed Webster.)

wouldn't change the appearance of the stake on the picture materially?

A. I don't know because I never saw a picture of it before.

Q. You do not know how it would look if the stake had been moved fifty feet? A. No.

Q. The stake, however, upon the ground as you remember it—

A. Yes, that is on the ground as I remember it.

Q. Was from ninety to one hundred feet—

A. Yes, to the best of my knowledge.

Q. You wouldn't say it was less than ninety?

A. Well, it might be; yes.

Q. How much less might it be?

A. I don't know. I have not been on the ground for a long long time; it was just in my mind it is about that far. It is quite a few years since I was on the ground.

Q. And you wouldn't say it was more than 100 feet?

A. Well, I would say it was between 90 and 100 feet to best of my knowledge.

Q. A stake approximately 200 feet away from the dam wouldn't be the stake you are now referring to?

Judge WINN.—We object to this and the preceding question as incompetent, irrelevant and immaterial and not proper cross-examination and not founded on the evidence. Objection overruled. Plaintiff excepts.

Q. If there was a stake found there approximately

(Testimony of Ed Webster.)

200 feet away [615] from the dam, it wouldn't be the same stake? A. I don't think so.

Q. As to Exhibit "W," the log cabin, you say, with reference to which you testified, is no longer *that*? A. No, it is gone.

Q. The boarding-house of the Humboldt people is still there? A. Yes, sir.

Q. And was there at that time?

A. That was built after I left the place; that was built since 1898, after they took the mine.

Q. And as near as you can recall the old cabin stood about where the letter "B" is?

A. Yes, as near as I can recall.

Q. Where is that stake?

A. Right in here (indicating).

Q. Marked with the letter "a"? A. Yes.

Q. That stake then was down the creek from the cabin?

A. Well, it was off to the left of the cabin, facing toward the bridge and a little on the hillside.

Q. And as to this stake, could that have been moved a few feet one way or the other, without showing on the picture?

A. It could be moved and I wouldn't probably know exactly it had been moved, but it seemed to be just as my mind had seen it then.

Q. According to your recollection it looks as though it was in the same place? A. Yes, sir.

Q. But you wouldn't say it is in the same place?

A. No, I could not.

Q. It has been a good many years since you were

(Testimony of Ed Webster.)

up there? [616] A. Yes, sir.

(By the COURT.)

Q. Which way was Mr. Garside surveying from—down this way, down the road from your millsite?

A. He came from this way up.

Q. That is, from Juneau up the creek?

A. Yes, sir.

Q. Did you have any controversy about where his lines could cross your millsite?

A. No; he ran the lines through there and staked the stakes, and when I found they had run through the millsite I went to him and asked him about it, and he told me they just wanted to square up their end lines and they would exclude this piece of the millsite.

Q. There wasn't any change made in the line because you made a fuss about it?

A. No, when they got the patent, they excluded this piece.

(By Mr. HELLENTHAL.)

Q. He started from the lower end, from the Lotta up towards the Crown Point?

A. He started from down this way and came across where the Ebner mill is and ran up the creek.

Q. He surveyed up the creek?

A. Yes, that is the way he was coming.

Witness excused. [617]

[Testimony of J. A. Dolfelmyer, for Plaintiff.]

J. A. DOLFELMYER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. How long have you been in and about Juneau?

A. Since last September.

Q. How long have you been in Alaska altogether?

A. Since 1903.

Q. Did you do any work for Mr. Mackey this last summer up on the Ebner property?

A. Yes, I was employed there.

Q. When did you go there?

A. I went to work on the 19th day of September, 1910.

Q. What were you doing?

A. Pick and shovel work.

Q. Now, we will get down to the Lotta and Parish #2 claims. You have been over those claims and looked up the stakes and found out about where the claims are as located on the ground? A. Yes, sir.

Q. Did you, during 1910, last summer or during the fall do any work on what is claimed to be the Lotta lode claim, last year—1910?

A. Yes, I did some work.

Q. When was that?

A. The first work I did was on the 28th day of September.

Q. What were you working at, what were you doing? A. I was building a trail.

Q. On what claim? A. On the Lotta.

(Testimony of J. A. Dolfelmyer.)

Q. Where was that trail leading from and to what place? [618]

A. Leading from what is called the lower tunnel or a point immediately above it, in the direction of the Ebner boarding-house.

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial and after the entry of the plaintiffs—I desire to have it understood that the rest of this testimony goes in subject to my objection and exception.

By the COURT.—It is so understood.

Q. Did anyone come up on that property or the Parish #2 on that day besides the people you were working for and with you?

A. Yes, sir, a surveyor passed us while we were at work.

Q. What surveyor?

A. I don't know his name and haven't yet learned his name. He was a young man.

Q. Do you know Mr. Kenzie? A. Yes, sir.

Q. Was Mr. Kenzie or any of his people up there that day, the 28th?

A. I didn't see Mr. Kenzie on the 28th; no.

Q. Did you see any of his people up there doing any work on that day?

A. No, I did not see any of those people.

Q. How long did you continue to work on this claim, the Lotta?

A. On the 28th I went to work, about half-past three in the afternoon, and continued until five o'clock.

(Testimony of J. A. Dolfelmyer.)

Q. Then the next day what did you do?

A. The next day I was back on the work on the high line flume.

Q. That was the 29th? A. Yes, sir. [619]

Q. When did you come back on the Lotta to do any work? A. On the third day of October.

Q. What were you doing there on the third of October?

A. About 9 o'clock the foreman came to where I was working—Mr. Reardon and Moore were working with me—and told me to bring our tools and go with him, and we went to a point up the creek, two or three hundred feet from where we were on the 28th, and we were told to build a trail there—cut out the brush and dig out a trail, which we did.

Q. Were any of Mr. Kenzie's people working down in the creek when you got up there?

A. Yes, sir, there were some men there when I went there.

Q. Did they stay there that day?

A. They remained until about noon.

Q. What did they do then?

A. They went away then except two men who were left there, two men were left, watchmen, I guess—they were not working—they remained on the premises.

Q. Were you doing any work there on the Lotta or Parish after that at any time when any of the people that claimed to be working under Kenzie came up there to do any work, any other date besides this one you have mentioned?

(Testimony of J. A. Dolfelmyer.)

A. Not after the third; no.

Q. Was there anything else took place there on the third except as you have described?

A. When I went on the ground, the men were in the creek doing some work and some men were across the gulch bringing down some timbers and Mr. Kenzie was in the gulch, that is, on a boulder. There was a man drilling nearby and the man I afterwards learned was Burch was across on the flume and [620] seemed to be directing work from that point and a man by the name of Harry seemed to be on guard, walking back and forth on the flume.

Q. Where were they taking those timbers from, did you see—was it timbers or boards that you saw?

A. They were both round timbers and some boards.

Q. Where were they taking them from and to?

A. From a point on the Basin road almost immediately above the dam or where we were.

Q. As to any further controversy that was had up there, you don't know anything about? A. No.

Q. Did you see a fence up there then across this road that led down from the regular Basin road to the air-compressor on the Ebner property?

A. Yes, sir.

Q. Did you ever see any notice up there?

A. Yes, sir.

Q. When did you first see that fence and notice there?

A. Some time about the 23d—22d or 23d of September.

(Testimony of J. A. Dolfelmyer.)

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. I understand you were working down the creek on a trail? A. Yes, on the 28th.

Q. Down the creek from the Lotta?

A. Yes, on the 28th.

Q. And on the third the foreman came along and had you change your base of operations?

A. On the third I was working on the high line flume as it is called, the new flume.

Q. When was it you were working there and were called down to [621] another place to work on this trail?

A. On the 28th we went to work almost above where the lower tunnel is situated and worked the balance of the day, from about three to five.

Q. How far did you get with that trail?

A. Oh, we constructed, I guess, 75 feet of rough trail there, got out the brush and dug out the trail.

Q. Where were you on the 29th?

A. I was on the high line flume.

Q. You were just on the trail on the 28th?

A. Yes, I was just on the trail on the 28th.

Q. On the 30th?

A. On the 30th I was on the high line flume.

Q. And on the first?

A. On the first I was on the high line.

Q. And on the 2d?

A. I was on the high line flume.

Q. On the third?

(Testimony of J. A. Dolfelmyer.)

A. Until about nine o'clock I was on the high line flume.

Q. Until about 9 o'clock in the morning of the third? A. Yes, sir.

Q. And then, the foreman sent you back to work on this other spot? A. Yes, sir.

Q. That is when you changed your base of operations? A. Yes.

Q. And were working on the trail there somewhere in the vicinity of what is known as the brushed-out side line between the Lotta and Parish?

A. Yes, a little above that brushed-out line, that is up the creek.

Q. And the men of the Alaska-Juneau Company at that time were [622] working at the place where the dam now is?

A. Yes, where it is marked on the map.

Q. And where it is now situated on the creek?

A. Yes, sir.

Witness excused.

Judge WINN.—I offer in evidence all those photographs we first had identified, the witnesses testifying concerning certain objects, etc., represented thereon, all of them except these two last exhibits which Mr. Webster testified concerning, as I desire to elicit a little further evidence concerning the objects thereon before I formally offer them in evidence. The exhibits offered are numbered from "H" to "N," inclusive.

Mr. SHACKLEFORD.—We object to them as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

They are admitted and given the same numbers as the identification numbers,—“H” to “N,” inclusive. * * *

Judge WINN.—There has been quite a little bit said here about the witness Mackey and some others being convicted of some crime. I desire to get before the Court just what they were convicted of, and we desire to offer in evidence at this time in explanation of some of the cross-examination that was conducted, I believe, by Mr. Shackleford of some of the witnesses, to show they were convicted of simple assault and fined fifteen or twenty-five dollars each—I have forgotten which—but that judgment we desire to offer in [623] evidence in justification of that.

Mr. HELLENTHAL.—We have no objection to that providing the verdict of the jury on which the judgment is based and the indictment be also offered to show it is the same transaction.

Judge WINN.—I am just offering the judgment and sentence which I desire to have withdrawn temporarily from the files and have it marked so it can be copied into the record.

Mr. SHACKLEFORD.—No objection to it.

It is admitted as Plaintiff's Exhibit “X,” is attached hereto and made a part hereof.

Judge WINN.—We desire to offer in evidence the motion of the United States District Attorney to dismiss the case against Mr. Burton, who was jointly indicted with these parties against whom the judg-

ment was rendered—that we have just offered in evidence.

Mr. SHACKLEFORD.—We object to it—we are not bound by the statement of the district attorney.

Objection sustained. Plaintiff allowed an exception.

Mr. HELLENTHAL.—I will admit that Mr. Burton had nothing to do with this thing for the purposes of the record.

Judge WINN.—We desire now to offer in evidence a copy of an oral opinion written by Judge Lyons in Case #803-A on our first application for a restraining order and the action brought by the Ebner Gold Mining Company against the Alaska-Juneau Gold Mining Company and others, which is certified to by Mr. Robertson, the official court reporter, as being a correct transcript of the oral decision which Judge Lyons rendered in open court in regard to that application.

It is admitted without objection and marked Plaintiff's Exhibit "Y"—copy is attached hereto and made a part hereof. [624]

Judge WINN.—I offer in evidence also a certified copy of Judge Lyons' oral opinion rendered in another application that was made for a restraining order by Mr. Hellenthal in Cause #823-A, The Alaska-Juneau Golding Mng. Co. vs. The California & Nevada Copper Co. et al., and we then filed a cross-motion and again renewed our application for a restraining order in 803-A, and also asked for a restraining order in the case of Tripp vs. This

Company in the case which we dismissed, and it is the order made by the Court in that case, showing the status of the parties and also showing that we again renewed our application and shows the exact status which we stand before the Court in to-day in regard to the matter.

Mr. HELLENTHAL.—I have no objection to any orders of the Court in that case, but I do not want to encumber the record with this opinion. I think there are matters in it which are incompetent, irrelevant and immaterial as to this case. It is a mere opinion of the Court and the basis of an order that was afterwards made.

By the COURT.—The nature of the order is indicated by the opinion?

Mr. HELLENTHAL.—No, not exactly; there was a series of orders based upon this opinion, upon the decision of the Court at that time, and I think the orders are the best evidence of what the Court did.

By the COURT.—It will be received and the other side may offer the orders, to be considered in connection with the opinion.

It is marked Plaintiff's "Z," attached hereto and made a part hereof. [625]

Mr. SHACKLEFORD.—At this time we would like to enter on the record our request for the Court to take judicial notice in connection with these opinions offered the allegations in the original complaint in this case, setting out an ouster in the month of August in this action now pending.

By the COURT.—The original complaint—you mean the complaint on which the case is being tried?

Mr. SHACKLEFORD.—The complaint under which the case was originally brought, but not being tried, it being since amended.

By the COURT.—Any superseded pleading in the case as I understand it, if it contains admissions, you will have to offer it in evidence.

Judge WINN.—I shall object to offering that now.

Mr. HELLENTHAL.—At this time I make a demand for the plaintiff to produce the original contract, option, paper or whatever document it may be, that shows the relation between the California & Nevada Copper Company and the Ebner Gold Mining Company, if any such paper exists.

Judge WINN.—That is one of the papers I have assurances has been mailed us. * * * The option, as we contend, is simply an option to sell stock and there is no option on the property proper. That is one of the papers we have sent for, but it has not yet arrived.

Mr. HELLENTHAL.—Let it be understood that Mr. Winn is to offer these papers at a later date, after he closes his case, and in the event that he does not offer them, we will be at liberty to make a motion to strike all testimony relative thereto, bearing upon the relation of these two institutions.

Recess to 7:30 this evening. [626]

Evening Session.

**[Testimony of Wm. M. Ebner, for Plaintiff
(Recalled).]**

WM. M. EBNER, recalled:

(By Judge WINN.)

Q. Mr. Ebner, were you in court at the time that Mr. Webster testified concerning some corner posts and stakes that he saw Garside set when Garside was making a survey of the Ebner claims, known as the Lotta, Taku lode, Keystone lode, Crown Point and Golden Fleece? A. Yes, sir.

Q. Did you hear his evidence concerning his having seen Mr. Garside set a stake at the intersection of the millsite and the southwesterly end line or side line of that millsite with the Taku lode claim?

Mr. SHACKLEFORD.—We object to any of that evidence for the reason that it is incompetent, irrelevant and immaterial, the Lotta claim being the key claim of the group and having been surveyed first and all the other claims tied to it.

Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. Did you hear his evidence also concerning his having seen the stake which is numbered 2 and 6 in red ink, which seems to be a common end stake of the Crown Point and the Keystone lode claim, at the southeasterly end line of those claims?

Same objection. Objection overruled. Defendant excepts.

A. Yes, sir.

(Testimony of William M. Ebner.)

Q. I will ask you, Mr. Ebner, if you are acquainted with those corner posts which were testified to by Mr. Webster?

Mr. SHACKLEFORD.—It is understood the same objection goes to all this line of testimony.

By the COURT.—Yes, sir, and you are allowed your exception.

A. Yes, sir. [627]

Q. How long have you known those corner posts and stakes upon the ground?

A. Since 1891 and 1892.

Q. You heard Mr. Winters testify upon the witness-stand this afternoon about your having taken him upon the ground yesterday and having photographs taken of certain corner posts and stakes—you are the same man that went with him, are you?

A. Yes, sir.

Q. I will hand you Plaintiff's Exhibit "W" for identification and will ask you to look at it and state from that card what objects you pointed out to Mr. Winter that you were anxious to have included in that photograph.

A. I pointed out to Mr. Winter this particular stake shown in this photograph, which is on the line of intersection between the Webster millsite and the Taku Gold & Silver lode.

Q. That is the one that Mr. Webster has marked what, on that exhibit?

A. I think I remember it was "A." I am not sure.

Q. It is marked "A" in black ink?

(Testimony of William M. Ebner.)

A. Yes, it is marked "A."

Q. How long have you known that post or some other post to be set there in that position?

Mr. SHACKLEFORD.—I object to the evident purpose of that question. Objection overruled. Defendant excepts.

A. You can see that the "A" is on the wrong post—it is just a little bit to one side of the real post.

Q. Are there two posts there?

A. Yes; the real post is this one to the right here with a small stake with a white paper over it, right there (indicating); the one marked is this one here—that is a small [628] stump, but they are very close together.

Q. The stake that you had then taken—

A. Was this stake to the right.

Q. I will get you to mark it—the stake to the right—put a cross on it.

A. All right. I will put a cross right over it. (Does so.)

Q. Now, that stake, Mr. Ebner, as set in that position as indicated there—how long have you known either that stake or some other stake to be in that same place?

Mr. SHACKLEFORD.—We object to the form of the question. It calls for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. I first knew of that stake in 1893.

Q. What surrounding objects are there there, if anything, that cause you to now identify the approxi-

(Testimony of William M. Ebner.)

mate position in which this stake has been these many years—is there anything there to indicate it to you?

A. Yes; in the first place the contour of the ground, the bridge, the creek, the little cabin that used to stand to the right of it and the Webster boarding-house, the old boarding-house as well as the new that stands to the left of it and being right close to the road.

Q. You heard Mr. Webster's direct testimony on the stand the other day concerning this stake being there near some little old cabin there—do you know what has become of that cabin?

A. That has been torn down.

Q. Then I will ask you to take this exhibit—I will change that. Can you take this exhibit and indicate on it from any objects that are shown in the photograph approximately where [629] this old cabin that Mr. Webster testified concerning was formerly located?

A. Yes, sir; right in front of the old cabin that is there now.

Q. Mr. Webster put a letter "B" there—if he found some evidence of a cabin there is that approximately the place?

A. That is just about the place—you can see I think, one of the foundation logs there now.

Q. I hand you now Plaintiff's Exhibit "V" for Identification and ask you if any one of these stakes which you have testified concerning and which you heard Mr. Webster testify concerning is indicated in this photograph?

(Testimony of William M. Ebner.)

Same objection. Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. Is there any mark placed on it there?

A. Yes, sir, an "X" is marked close to it.

Q. Mr. Webster found the proper stake then?

A. Yes, sir.

Q. How long have you known that stake to be there or some other stake located approximately where that is? A. Since 1891.

Q. Now, are there any surrounding objects there, Mr. Ebner, that you desire to use in connection with the location of this stake as indicated in this photograph?

A. The Webster dam is right almost in line with it and the flume.

Q. I hand you another exhibit which has been identified to-day by Mr. Winter—it has been marked for identification "U"—I ask you what that is a photograph of?

A. This is a photograph of the falls, the lower falls, as shown from the road. [630]

Q. Are those falls below the mill or above the Ebner mill? A. They are below the mill.

Q. Approximately, how far are those falls from the corner post #2 of the Lotta lode claim?

A. Is that the one down the creek?

Q. No, #2 is the one up the creek, the furthest one up.

A. They are right in the falls or right in the creek, practically in the creek.

(Testimony of William M. Ebner.)

Q. Does that photograph that you have there in your hand show the ground or the location approximately where this corner stake should be?

A. It does not—it is covered with snow here.

Q. Now, I will ask you how long you have been acquainted with the creek-bed and the flow of Gold Creek—say the place where it comes down over the falls there and on down the creek to where it passes the point of Corner #2 of the Lotta lode claim?

A. For the last twenty years—more than twenty years.

Q. I will ask you to state to the Court, and if you desire to use this exhibit to illustrate your answer, do so, as to whether or not the creek-bed at the falls and on down to where this corner post #2 is has ever changed any since you have been acquainted with that creek or has the creek-bed and the flow of the water remained the same?

Mr. SHACKLEFORD.—We object to the question for the reason that no proper foundation has been laid, and for the further reason that the question seeks to elicit the opinion of the witness instead of any statement of fact with reference to same and leading.

By the COURT.—Objection overruled. It is leading but it is preliminary. [631]

A. The falls have changed a great deal—they are lower and have shifted to one side, to the left, a great many years ago, probably fifteen years ago; fifteen or eighteen years ago they were still to the right where there is a cavern shown.

(Testimony of William M. Ebner.)

Q. Cavern shown on what?

A. On this photograph; they were much higher and the ground on the left was higher. That has been cut down, the entire falls have been cut down a great deal, it is safe to say ten or fifteen feet in that particular place, and the falls twenty years ago or eighteen years ago used to flow more to the right and come down, probably, and, at least twenty-five or thirty feet further to the right than they do now, and in that respect the creek-bed just below the falls has changed.

Q. Do you mean the right looking up or looking down?

A. Looking up—looking at the falls from the road. They have shifted to the left side of the creek going up—they used to be further to the right going up the creek.

Mr. SHACKLEFORD.—We move to strike the testimony of the witness for the reason that it is not proper examination of a recalled witness—the question as to the position of the creek having been brought out on his original examination. Motion denied. Defendant allowed an exception.

Q. You had not finished your answer. I asked you then to go on and explain concerning this same matter down as far as where we contend that the corner #2 of the Lotta is or should be.

A. Well, the foot of the falls are right close to where the corner would be—the foot of the falls are just about down [632] where the corner would be. The falls are there now, but not where the falls were

(Testimony of William M. Ebner.)

twenty years ago.

Q. I will ask you as to whether or not the changes that you have indicated would widen the creek-bed and wash it over towards this corner stake #2, or would it wash it over on the right-hand side and widen it in that direction?

Mr. SHACKLEFORD.—We object as suggestive, and calling for an opinion of the witness and not based on any observation.

Objection sustained as leading and suggestive.

Q. What effect, if any, would the flow of the water there, as you have observed it for those last twenty years have, if any, upon the creek-bed at the point where this corner stake #2 of the Lotta claim should be?

Objected to as calling for a conclusion of the witness. Objection sustained.

Q. What effect, if any, has the flow of the creek had there in regard to the creek-bed just where this corner post #2 should be or right down towards the creek, at right angles from the corner?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial and not competent evidence for a recalled witness under the circumstances under which this examination has been had.

Objection overruled. Defendant allowed an exception.

A. It was the changing of the falls to the left that had the effect of throwing the creek at least twenty or twenty-five feet further to the northeast than it

(Testimony of William M. Ebner.)

used to be. That is my personal observation.

Q. Would that throw it in the direction of the corner #2 of the Lotta or away from it? [633]

A. It would throw it in the direction of the corner.

By the COURT.—You are sure you are right about those directions there—northeast?

A. Northwest—did I say northeast?

By the COURT.—Yes, sir.

A. I mean northwest.

Mr. SHACKLEFORD.—We make the same objection to the last question. Objection overruled. Defendant allowed an exception.

Q. You are acquainted with Mr. Mackey?

A. Yes, sir.

Q. And Mr. Tripp? A. Yes, sir.

Q. And I believe it has been stated here in this case from some standpoint that you owned in your own name the Cape Horn lode claim upon which Mr. Mackey has begun to drive what is known as the Ebner mine tunnel? A. Yes.

Q. I will ask you, Mr. Ebner, if you ever gave anyone consent to drive a tunnel in there or over that claim?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial, and for the further reason that the suits instituted by the company themselves and the admissions in the pleadings in this case up to a few days ago estopped the plaintiff from now claiming that they are going through the Cape Horn lode under a license unless it has been given since that time as a ratification, and

(Testimony of William M. Ebner.)

on the further ground that it is not competent evidence with reference to any interest or right in real estate.

Objection overruled. Defendant allowed an exception.

A. Yes, sir. [634]

Q. Who, if any, persons did you give consent to to run this tunnel through this claim?

Same objection. Objection overruled. Defendant allowed an exception.

A. Mr. Tripp gave him the right to start his tunnel on the Cape Horn #2 and run through the Cape Horn.

Mr. SHACKLEFORD.—Was that permission given in writing?

A. It was.

Mr. SHACKLEFORD.—Then, we move to strike the testimony of the witness.

(By the COURT.)

Q. Have you the writing or a copy of it?

A. I have not.

Q. Do you know where it is?

A. My copy is home—at my home. I gave Mr. Tripp first the permission orally, verbally—permission to go on, and he started working there, and then he thought he should have some permission to show that he had a right to start there.

Q. He started to work under your oral permission and got the other permission afterwards?

A. Yes, sir.

(Testimony of William M. Ebner.)

By the COURT.—The objection will be overruled.

Defendant allowed an exception.

(By Judge WINN.)

Q. What about Mr. Mackey's continuation of this work up there or if Mr. Mackey was working under Mr. Bent, what about Mr. Bent—the continuation of this tunnel ?

Same objection. Objection overruled. Defendant allowed an exception.

Q. Did you ever give them permission, orally or otherwise, to [635] go ahead and drive the tunnel?

Same objection. Objection overruled. Defendant excepts.

A. I gave Mr. Bent an oral permission to continue the tunnel.

Q. What was the purpose of you giving permission and why was it you gave them permission to drive this tunnel in and over this claim that you held in your individual name?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. I gave them permission to drive that tunnel for the benefit of all the claims, the Cape Horn claims, the Parish claims and the entire group.

Mr. SHACKLEFORD.—We move to strike the answer of the witness as stating a conclusion. Motion denied. Defendant allowed an exception.

Q. Now, Mr. Ebner, I will ask you what claims was

(Testimony of William M. Ebner.)

the ore taken from that were milled in the Ebner mill while you were running and operating that plant.

Objected to as incompetent, irrelevant and immaterial.

By the COURT.—What is the purpose of this?

Judge WINN.—I wish to show, in conformity with Mr. Tripp's testimony, that all of this plan or scheme of the tunnel of Mr. Tripp was to come down at the lowest point on the Ebner property and run a tunnel which would tap all of the other property
* * * I want to show by Mr. Ebner that the mines that were worked were way up at the upper end of the property and the intention was to take it out at a lower point.

Objection overruled. Defendant allowed an exception.

A. The ore was taken from the Grand Review and from the Keystone.

Q. Do they lie at the upper or lower end of the Ebner group of [636] claims?

A. They lie about the middle, a little above the middle of the property.

Q. Where do they lie with respect to the Parish #2 lode claim?

A. They lie further to the northeast from there, higher up.

Q. Higher up the Creek? A. Yes, sir.

Same objection to all this testimony. Objection overruled. Defendant allowed an exception.

Q. With respect to the Ebner mine tunnel, then,

(Testimony of William M. Ebner.)

these claims that you milled the ore from, would be at a lower altitude or a higher altitude than the Parish lode #2?

A. It would be a much higher altitude.

Q. I will ask you, Mr. Ebner, if you knew one Joseph McDonald, who was in 1904 superintendent of the Alaska-Treadwell Gold Mining Company's mines over on Douglas Island? A. Yes, sir.

Q. Now, at the time that the Colorado claim was surveyed for patent and the conflict occurred with the Parish lode, I will ask you if you know what position McDonald held with respect to the Alaska-Juneau Company, the defendant in this case?

A. He told me that he was the superintendent.

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial and not the best evidence.

Objection sustained. Plaintiff excepts.

Q. I will ask you in what capacity he was acting at that time with reference to the Alaska-Juneau Company, the defendant in this case?

Mr. SHACKLEFORD.—Same objection and the further objection that it calls for a conclusion of the witness. [637]

Objection sustained. Plaintiff allowed an exception.

Q. I will ask you if you had any dealings with Mr. McDonald in regard to the conflict of the Parish claim with the Colorado at the time that this survey was being made?

Objected to as incompetent, irrelevant and imma-

(Testimony of William M. Ebner.)

terial. Objection overruled. Defendant allowed an exception.

A. Yes, we were negotiating.

Q. For what?

A. He was negotiating for a right of way.

Q. A right of way through what?

A. A right of way for a tunnel through that ground in conflict and we had agreed to it—

Mr. SHACKLEFORD.—Let me ask him a question first.

Judge WINN.—I want to go ahead and show this state of facts—that he had negotiations with Mr. McDonald and that McDonald at that time was acting in the capacity of superintendent of that company's property up there, and in these negotiations he had with McDonald he offered to sign up papers as superintendent of that company up there, but he didn't do it because Mr. Ebner told him he didn't think he had authority, but the same negotiations that were had with McDonald were sent down to the company and was ratified and the deal went through as negotiated with Mr. McDonald. I expect to call on Mr. Kenzie to prove this fact.

Mr. SHACKLEFORD.—I want to ask Mr. Ebner if his negotiations with Mr. McDonald were not reduced to writing?

Judge WINN.—The negotiations with him were—

Mr. SHACKLEFORD.—I ask permission of the Court to ask him whether the negotiations were not reduced to writing.

By the COURT.—You may do so.

(Testimony of William M. Ebner.)

*Q. (*By Mr. SHACKLEFORD.*) Mr. Wh—
[638] pany with reference to the right of way through the Colorado and Parish lode were reduced to writing?

A. They were reduced to writing right there.

Mr. SHACKLEFORD.—Where is that writing?

A. I think the same writing was produced the other day—I have it.

Mr. SHACKLEFORD.—We object to any further testimony on that subject.

Judge WINN.—I want him to explain that the thing was agreed upon between him and McDonald, as this contract that we offered in evidence in this case was sent down and the company ratified it.

By the COURT.—The objection is sustained on your offer. You stated that Mr. Ebner concluded that Mr. McDonald didn't have authority.

Judge WINN.—He did not, because he was merely superintendent up there—he had authority to first outline the plan with Mr. Ebner, but he did not have the right—

By the COURT.—I understand you are undertaking to sustain Mr. McDonald's authority to make this statement regarding the Parish that you got in testimony about the other day?

Judge WINN.—No, sir; it is only this, that Mr. Ebner was dealing with McDonald all the time in regard to this adjustment, and then McDonald came around as superintendent and offered to sign these agreements that were drawn up and Ebner said,

*Owing to defective carbon copy, omitted words do not appear in original Certified Transcript of Record.

(Testimony of William M. Ebner.)

“Well, as superintendent up there, I don’t know, I would rather have this as an act of the corporation,” and then the agreement that was consummated was consummated with the company, just exactly in the form that, well at Mr. McDonald’s dictation, showing that he had authority here to [639] at least recommend this.

By the COURT.—There is nothing in your offer as outlined to show whether Mr. McDonald was a special agent charged with the carrying on of this agreement or whether or not he was the general superintendent or general manager controlling the property. If some particular negotiation that he had charge of the preliminaries of was consummated and ratified by the acts of the company, that does not prove his general authority.

Judge WINN.—I intend to show that McDonald had charge of the property there the same as any superintendent. We don’t try to hold that McDonald had the right to sign this, but I want to show the general acts of McDonald,—that he was up there superintending that property.

By the COURT.—You may ask him if McDonald had charge of the negotiations that culminated in that agreement, that is, for the other company.

Judge WINN.—You will allow me an exception to the ruling?

By the COURT.—Yes, sir.

Q. I will ask you whether or not you had any dealings with Mr. McDonald which consummated in the final execution of the contract which has been offered

(Testimony of William M. Ebner.)

in evidence in this case, which pertains to the allowing of the Alaska-Juneau Company of a right of way for a tunnel through that part of the Parish claim that was in conflict with the Colorado and also which provided for the further allowance to your company of the conflicting part of the Colorado with the Parish claim?

A. Yes, sir, my negotiations were with Mr. McDonald altogether.

Q. I believe you testified the other day how this settlement [640] was finally consummated, did you not,—by your going to San Francisco, to the head office of the company? A. Yes, sir.

Q. Now, I will ask you if the negotiations that you had with Mr. McDonald just as you have told about them, were ratified by the company down there?

A. Yes, sir.

Q. I will ask you if you were doing business here in 1904?

A. Mining business up here on the property.

Q. I will ask you if you know in what capacity was McDonald holding out there and was acting during this time—1904? A. Yes, sir.

Objected to as calling for a conclusion of the witness. Objection overruled. Defendant allowed an exception.

Q. In what capacity?

Same objection. Objection overruled. Defendant allowed an exception.

By the COURT.—That is, holding himself out during all this time you have mentioned.

(Testimony of William M. Ebner.)

Judge WINN.—I mean the year 1904—I don't know how long he remained here—1903, 4 and 5.

A. It was in 1904—it was some time just before that. The reason why I knew positively that he was, I repaired the road, the Basin road, and informed Mr. McDonald the amount and he sent me a check signed the Alaska-Juneau Gold Mining Co., Joseph McDonald, Superintendent—in that way I knew he was superintendent.

By the COURT.—Was the check paid?

A. Yes, sir.

Q. What road was that? A. The Basin road.
[641]

Q. When you refer to the Basin road, where does that road lead to, from what place to what place?

A. It leads from the town of Juneau to the mines in the Silver Bow Basin—the Ebner mines, Alaska-Juneau mines, Perseverance Mines,—all those mines.

Q. Now, Mr. Ebner, over what years were you and have you been an officer of the Ebner Gold Mining Co.?

Objected to as incompetent, irrelevant and immaterial and not the best evidence.

Objection overruled. Defendant allowed an exception.

A. I have been a director and its *present* since its formation in 1895.

Q. Who has been the secretary of that company?

A. Mr. B. M. Behrends.

Q. Have you here now the stock-book and the minute-book of that corporation? A. Yes, sir.

(Testimony of William M. Ebner.)

Q. I will hand you this book and ask you what it is.

A. This is the stock-book of the Ebner Gold Mining Company. It shows the stock issued or stock outstanding.

The book is marked for identification, Plaintiff's Exhibit "AA."

Q. I will ask you if that company since its organization has had any other stock-book except this one.

A. No, sir; that is the only one.

Q. From what stock-book, then, has the certificates of stock in that corporation been issued ever since its organization down to the present time?

A. From this particular stock-book.

Q. Now, preparatory to the introduction of certain portions of [642] that book in evidence, I will ask you to state in a general way what that stock-book contains.

A. It contains stock certificates and stubs of the certificates.

Q. I will ask you if any stock has ever been issued by the Ebner Gold Mining Company other than the stock that is indicated in this book.

A. No, sir; not to my knowledge; no, sir.

Q. Now, I will ask you to state in a general way—I will ask you what it contains with reference to the issuance of stock and to whom the stock was originally issued.

Mr. SHACKLEFORD.—We object to all this testimony as incompetent, irrelevant and immaterial.

Judge WINN.—It is preliminary—I expect to of-

(Testimony of William M. Ebner.)

fer one of the pages of that book.

Objection overruled. Defendant allowed an exception.

A. Why, it shows the stubs here; it shows the number of the certificate and the number of shares and to whom issued and when.

Judge WINN.—I desire to offer in evidence from this book—I don't know what the pages are numbered—

The WITNESS.—The stock certificates are numbered—they go consecutively.

By the COURT.—Are the stubs numbered?

A. Yes, sir, the stubs are numbered and the certificates.

Judge WINN.—I desire to offer in evidence the stubs of all the certificates that have been issued from Certificate #1 down to 121, inclusive, and also I desire to offer in that connection all of the returned certificates which were pasted in this book, included between Certificate #1 and [643] Certificate #121, and all the matters pertaining to them—the endorsements on the back.

By the COURT.—Are they all there?

Judge WINN.—Yes, sir, they are all there. The certificates have been returned and new certificates issued in lieu of them, but of course there are certificates of stock outstanding in some other people's name, but those that have been returned are indicated here. I desire to offer all those certificates—it shows the entire transactions of the company so far as stock is concerned and all the endorsements are on the

(Testimony of William M. Ebner.)

back of the certificates.

By the COURT.—What is the purpose.

Judge WINN.—It is for two or three purposes. In the first place, it is an aid and assistance in proving that this company is a *de facto* corporation * * * we desire to show to the Court that there is not any interest in the Ebner Gold Mining Company outstanding to-day, but what is represented by the stock issued by that company and any outstanding interest that anybody has is by reason of the stock issued by the Ebner Gold Mining Company. It is a *de facto* corporation * * * there has never been a transfer of the stock on the books of the corporation and the stock stands to-day in the hands of the original stockholders.

Mr. SHACKLEFORD.—We object to that testimony as incompetent, irrelevant and immaterial and not a part of the plaintiff's case in chief, and also as not within the pleadings of the case, and I would like to ask counsel now if he expects to amend his pleadings to conform to the proof contained in that stock-book. If he does he had better make the amendment here now.

Judge WINN.—We have no amendment to make.

The objection was by the Court overruled. Defendant allowed [644] an exception.

Judge WINN.—I offer all the stubs and everything pasted in the books.

Admitted. Copies attached hereto and made a part hereof.

Q. Now, Mr. Ebner, I will ask you if you have the

(Testimony of William M. Ebner.)

minute-book here containing the by-laws of the Ebner Gold Mg. Co.? A. Yes, sir.

Q. I wish you would turn to that book and tell upon what pages the by-laws are recorded?

A. They are recorded on page 4 to page 9, inclusive—a portion of page 9.

Judge WINN.—I offer it in evidence. I offer in evidence the by-laws of this corporation which are contained on these pages of this record book and ask that the reporter be authorized to copy them into the record. The purpose is along the same line as the other evidence I offered.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

It is marked Plaintiff's Exhibit "BB," attached hereto and made a part hereof.

Q. Now, I will ask you if the Ebner Gold Mining Company has ever entered into any contract with any person or corporation whatsoever for the conveyance of the mining property of the Ebner Gold Mining Company, that is, the mining property up there alone, the real estate?

A. Well, some years ago they did, a great many years ago,—about five years ago they did.

Q. I will ask you if there is any outstanding agreement at present or option to any person or corporation whatsoever that has been signed by the officers of the Ebner Gold Mining [645] Company for the

(Testimony of William M. Ebner.)

sale of the real estate and the appurtenances thereto to anyone?

A. No, sir, not now—no, sir, there has not been for years.

Q. Where did you obtain these books—did you bring them from California with you or have they been here in Juneau?

A. Those have been in the custody of Mr. B. M. Behrends.

Q. I will ask you if—we will say from 1904 or 5, I will not go back further than that—up to the year of 1909, inclusive, whether or not you have been acquainted with the going wages that have been paid to individuals doing and performing assessment work on mining property in Alaska?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial, and we demand the books of the Ebner Gold Mining Company, the California & Nevada Copper Company, from the date that Ebner's ledger quits to the present time to show what was actually paid.

Objection overruled. Defendant allowed an exception.

Q. You may answer that yes or no.

A. Yes, I know—I am familiar with it.

Q. I mean in Southeastern Alaska, in and about Juneau?

A. Yes, sir.

(Testimony of William M. Ebner.)

Q. I will ask you to state what they have been over that period of time, I mean from the year 1904, inclusive, of the year 1909—I believe you left here some time during the latter part of 1909?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. Why, the going wages were from \$3.50 to \$4.00 where the man boarded himself and you furnished the tools. [646]

Q. In case you boarded them, what then?

A. When you boarded them probably it would be from \$2.50 to \$3 and his board.

Q. What is that?

A. If you boarded him, from \$2.50 to \$3.00.

Q. You said it was from \$3.50 to \$4 when he boarded himself?

A. It was from \$3.50 to \$4—it all depended on just where it might be located—and he boarded himself.

Q. In case you boarded him, what then?

A. Then it would be from \$2.50 to \$3. It is pretty hard to get a good man for less than \$2.50 and board.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. This is the record-book of the Ebner Gold Mining Company? A. Yes, sir.

Q. I wish you would turn to that record-book and show the Court the place, if any, where any transac-

(Testimony of William M. Ebner.)

tions or agreements have been recorded between the Ebner Gold Mining Company and the California & Nevada Copper Company.

A. I couldn't show any—it is not in here.

Q. You never had any contract, agreement, transaction or arrangement of any kind? A. No, sir.

Q. How far did you say it was from the falls in Gold Creek as indicated on this picture Plaintiff's Exhibit "U" for identification, to the place where it is claimed by the witnesses for the plaintiff in this case Stake #2 of the Lotta is situated?

A. I said it was right at the foot of the falls.

Q. You know as a matter of fact it is 100 feet from the foot of the falls? [647]

A. No, I do not.

Q. You deny that it is?

A. I don't think it is. I don't know, but to the best of my knowledge I think it is right at the foot of the falls.

Q. Now, what is there on that picture that indicates it? A. Nothing.

Q. There is no brushed-out line or thing that settles it in your mind?

A. No, except by sighting from one stake to another. I know where about it should be.

Q. There are no stakes on this picture?

A. There are no stakes on this picture.

Q. Is that the cavern you refer to?

A. I think that's it showing plainly there—to the right of the falls; that is the one.

(Testimony of William M. Ebner.)

Q. Take a pen and mark that cavern—mark it “C².”

A. I will mark it just above, this way. (Witness marks it.)

Q. Now, that is really not a cavern; it is a place evidently where boulders have been imbedded in some way and gone out.

A. It is a place where the water has washed out and worn out the rock.

Q. How deep overhead is it—would you say three or four feet?

A. Yes, I guess it is all of that. I think it is more than that probably.

Q. That cavity there that you call a cavern has been washed out since you have been in Alaska?

A. I expect it has. I wouldn't say as to that, but as the falls gradually receded and went to the left a cavern became visible.

Q. When you first came here you couldn't see that cavern? [648]

A. Except in the winter-time, when the water was very low you could see the cavern there.

Q. What is the stage of water at the present time up there?

A. It is what you might call a summer stage.

Q. A high stage of water?

A. No, not a high stage of water.

Q. Summer stage in this country is the high stage, a high stage.

A. No, not high stage; no, sir.

Q. But, ordinarily, except in the extreme low

(Testimony of William M. Ebner.)

stages, you could not see that cavity when you first came to Alaska? A. No, sir.

Q. Now, the old channel of the creek, as I understand you, ran over this place marked "C"?

A. Yes, sir.

Q. And you first saw it? A. Yes, sir.

Q. And that cavity is how far now from the thread of the creek the day that picture was taken?

A. It must be six or eight feet or more.

Q. Six or eight feet?

A. Yes, sir, more than that.

Q. Then, in your opinion, that has thrown the creek over in the direction of stake #2 of the Lotta?

A. It has thrown it to the left as you face the falls.

Q. That is in the direction of stake #2 of the Lotta? A. That is in the line, yes, sir.

Q. That is the reason that water raised to the left?

A. I don't know; that is one of the peculiarities of this creek here.

Q. Did you hear Mr. Hill's testimony here the other day to the [649] effect that the ground on the left-hand side of the creek was softer than the ground or rock, whatever you might call it, softer than on the right-hand side?

A. I don't remember that. I don't know that I was in here; I don't remember that.

Q. Well, is it?

A. I don't know whether it is or not.

Q. It is shaley, is it not, on the left-hand side of the creek?

A. When you get away from the fall on the left-

(Testimony of William M. Ebner.)

hand side is slidey—it is not slidey there.

Q. Where—what do you mean by that?

A. I mean the left-hand side going up as you face the falls, standing on the road.

Q. It is slidey?

A. Yes, I refer to away from the falls—that side is not as solid; the rock is not in places solid there as it is on the right-hand side.

Q. And in your opinion also this change in the creek has caused the creek at the intersection of the south line of the Lotta to be thrown to the right-hand of the creek as you look on the creek, going up?

A. I don't know about that; in some places it will shift one side and then it will shift on another.

Q. You have not made any observations?

A. Yes, I have made quite a good many observations.

Q. Not at the lower crossing?

A. Not particularly there, but as far down as my new mill—I think I know about that.

Q. I mean as far down as the compressor plant?

A. Yes, sir. [650]

Q. Beyond that you have not made any observation? A. Not as close as above that.

Q. And you simply say that at the point marked stake #2 of the Lotta you think the creek has changed its course to the west?

A. To the northwest, it has, since I have been here; yes, sir.

Q. To the northwest? A. Yes, sir.

(Testimony of William M. Ebner.)

Q. At the foot of the falls there is a big boulder, is there not?

A. There is a comb of rock, a hard comb of rock, that comes across and makes a big pothole behind it, and there are probably some big boulders in there too.

Q. I now call your attention to a projection under the veil of the water there in the centre of the creek in the foreground of this picture, Plaintiff's Exhibit "U," and ask you if you recognize that boulder or rock that shows under the veil of the creek there?

A. Yes.

Q. Now, I will ask you to mark that spot there.

A. I don't know whether that is a rock or part of this same hard comb or belt that comes across there. I think it is.

Q. I will ask you to mark that spot there, mark it "B¹." A. I will mark it right over it. (Does so.)

Q. Now, the Lotta stake #2 should be how far from that boulder?

A. I don't know; that is about on the line.

Q. With the Lotta stake #2—that is a line drawn across the creek at that point? A. Yes.

Q. Would strike—

A. A line from the stake on the road to where the line crosses [651] the well-house and in line with the stake at the intersection of the Webster millsite and all of those stakes on the north line, it would be just about in there; I wouldn't say it would be right where that boulder is there or right opposite that boulder but close by there—probably not close

(Testimony of William M. Ebner.)

to the boulder, but probably in that line.

Q. Within how many feet?

A. I couldn't tell that.

Q. How near approximately?

A. That I couldn't tell.

Q. You know from this map that stake #2 is right in the edge of the creek?

A. I should judge it was probably to the west of that boulder, just about where that snow is there, that is about—I am not so familiar with the side line of the Lotta—that side line there I have had surveyed and they would traverse it to come around the road.

Q. Now, mark on this snow about where you think that stake ought to be—you say it is covered with snow?

A. I should think it would be just about this point approximately.

Q. Mark it "S²."

A. The only thing I can mark is about the line—along the north line.

Q. Well, mark it where it would come through there.

(Witness does so. It is marked "S².")

Q. You have seen the stake there a good many times, have you not?

A. The one down at the falls?

Q. Yes. A. No, I never saw that. [652]

Q. You never saw that stake?

A. No, I am only approximating from the north line—sighting along the north line.

(Testimony of William M. Ebner.)

Q. Did you see that stake when you located the Parish #2? A. No, sir.

Q. You hadn't found that stake?

A. No, sir, not that stake.

Q. But you knew where that line crossed the creek when you located the Parish #2?

A. No, not when I located the Parish #2. I know where the other line crosses the creek.

Q. There is a place up here at the corner of the Lotta marked dump? A. That shows right there.

Q. That is your dump?

A. That has been the dump, yes, sir—I mean below the falls and to the right—it shows on the picture, on Exhibit “U.”

Q. If Mr. Hill says that dump would cause the Lotta—would cause the creek to move over to the end line of the Lotta and throw stake No. 2 in the creek at that point, he is mistaken?

A. No, sir, I have seen that, in dumping the entire winter, when the water was *lot*, it would run through the dump, it would seep through the dump and in the spring of the year, the dump being on this side, it would cut around on the northwest side of it.

Q. The dump has washed off along the creek bed there now?

A. It is now, yes; the high water has washed it away.

Q. And according to your theory the creek has changed its course up above the dump, hasn't it?
[653]

A. The falls and creek have changed above the

(Testimony of William M. Ebner.)

dump; yes, sir.

Q. How many feet do you say it has changed?

A. They are changing—those falls from what it used to be has changed that creek and thrown it toward the northwest at least twenty-five to thirty feet, where the falls strike at the bottom.

Q. But it is only 6 feet, as I understand it, at the point marked “C,” where that cavity is?

A. It is about that, but the falls used to come down on another angle, and it is plainly shown on that photograph where the bare rock is—that is where the notice used to be.

Q. When did it strike you that the creek had changed its course?

A. I have known that from personal observation for the last twenty years. I saw it gradually change.

Q. Were you here during any of the hearings last fall? A. No, sir.

Q. You were not here? A. No, sir.

Q. You made an affidavit that you didn't know the position of the ground involved?

A. No; I made an affidavit as regards the stakes on the Lotta, I think.

Q. Now, when you were discussing the position of the Lotta—the question as to the position of the Lotta came up when you were on the stand last time, in discussing it with your attorney, Judge Winn?

A. The position of it?

Q. Yes, with reference to the creek ties?

A. I think that was discussed, yes, sir. [654]

Q. How did it happen that your evidence was not

(Testimony of William M. Ebner.)

elicited in that respect when you were first on the stand?

A. Well, I guess Judge Winn didn't know anything about it.

Q. You hadn't told him?

A. I hadn't told him; my personal observations had been that the creek had changed.

Q. How did you happen to locate the Parish lode that is, did you take a man with you the day you located it?

A. Do you want to know the history of it?

Q. I will ask you now, the Parish #2 lode, was anybody with you the day you made your discovery?

A. When I made my discovery I think I had two men with me at that time.

Q. How did you happen to take these two men with you?

A. In the first place, I always take a man with me when I go out in rough places, and I had them for cutting brush—the brush was very high and a great deal of it.

Q. Did you go out on a prospecting expedition or did you just happen to be cruising there?

Judge WINN.—We object to that as not a proper question. It was covered before on cross-examination.

By the COURT.—He may answer.

A. There is a man named Parish had this located before I ever thought of locating it. I saw him here in Juneau about two years after he located them and I asked him about the ground—asked him if he had

(Testimony of William M. Ebner.)

found any values, and he said he had but he didn't do the assessment work.

Mr. SHACKLEFORD.—That is not responsive to my question, and we object to it.

Objection sustained. [655]

The WITNESS.—That is the way I came to locate them.

Q. Parish let the lodes lapse, did he?

A. Yes, sir.

Q. So you went out there some time—was it August, 1899?

A. It was during the latter part of the summer. I prospected around for some time before we started to locate them.

Q. And your location notice described your discovery point?

A. Yes, sir; within a few feet or a short distance; yes, sir.

Q. I wish you would describe to the Court the appearance of that discovery.

A. Why the discovery on the Parish #2, Mr. Shackelford, is just north of a pit, an old pit, that was there.

Q. The Borean pit?

A. The Borean pit and the bedrock stuck out in one place there and showed quartz—that was the discovery for the Parish #2.

Q. Is that bedrock there now?

A. I think that that is blasted out. I think that is where the open cut was made.

Q. It is blasted out? A. Yes, sir.

(Testimony of William M. Ebner.)

Q. After you got through sampling and blasting this rich rock did you leave any there that anybody could find any value in?

Objected to as incompetent and immaterial and not proper cross-examination.

Objection overruled. Plaintiff allowed an exception.

A. I didn't carry any rock away except that which I used for assaying.

Q. Did you leave any rock of value there?

A. Yes, sir.

Q. Could you show it to anybody now? [656]

A. Yes, sir.

Q. Where else have you got rock, gold-bearing rock within the meaning of the mineral statute, that has value for mining purposes?

Objected to as not cross-examination. Objection sustained.

Q. You claim it is a gold-bearing rock?

A. Yes, sir.

Q. There is no other mineral you discovered in it?

A. No.

Q. Where else?

A. There is a point down the creek from the tunnel I started a little ways, and up on the bank there are some stringers that show there, and that is where we made the open cut, and there is quartz piled to one side now, some little of it left that the slide has not taken down and some boards lying there. We had a large open cut there, some twenty-odd feet long and seven or eight feet wide, in order to get down

(Testimony of William M. Ebner.)

to the solid rock, and there is some good pay-rock there.

Q. Not in place? A. Yes, sir.

Q. You can show that? A. Yes, sir.

Q. And it will assay pay-rock?

A. Yes, sir, take an average sample across there and it will assay.

Q. What is the width of that cut, the average sample?

A. That cut was right across the formation, and, if I remember right now, there was some sixteen or eighteen feet there.

Q. Where is that cut? Mark it on this map.

A. I can do it approximately. Is the lower tunnel marked on here? [657]

Q. Yes, it is right there—the upper is here and the lower one there. You are referring to the tunnel underneath the present Alaska-Juneau flume-line?

A. It is the one close down by the creek; when the water is high, high water almost runs into it—it does run into it when it is high, very close to it, and it is just above that tunnel, down the creek, on the bank. I can mark that approximately.

Q. How far from that tunnel down the creek?

A. It is probably 30 feet or so down the creek and up on the bank. The bank is very high. I mark this here—it will be very approximate, because the bank slopes some there.

Q. It is in that open cut?

A. It is in that open cut; yes, sir.

Q. And the open cut is plainly visible?

(Testimony of William M. Ebner.)

A. Yes, it is visible from the road now—I have marked it there with a lead pencil mark.

Q. How is it marked?

A. I have just made two straight marks.

Q. That is the two lead pencil marks just down the creek from the place marked tunnel?

A. Yes, sir.

Q. Did you follow that up, that ledge up?

A. No, we prospected that on the surface, done the work there and then started a tunnel below.

Q. In 1904 you quit doing all your underground work?

A. I don't remember whether it was in 1904.

Q. It has been some years since you have done any underground work? A. Yes, sir. [658]

Q. And you commenced working another part of the claim? A. Yes, we worked on another part.

Q. You know as a matter of fact, don't you, that that claim is out of the known value belt of the country through there?

A. I don't know anything of the kind. I know there is value there.

Q. You want the Court to understand that the Parish lode was not located for any purpose of convenience in saving your rights? A. No, sir.

Q. To reach the other side of Cape Horn?

A. No, sir.

Q. You had no such idea in mind at the time?

A. No, sir; not at all.

Q. Do you know any other place—can you point me to any other place on the Parish lode where pay

(Testimony of William M. Ebner.)

and rock in place can be found?

A. Approximately, yes.

Q. Approximately? A. Yes, sir.

Q. Where is it?

A. Close to the Lotta line, and almost opposite the cabin, about thirty or forty feet from the Lotta line, in one of those cuts I made across there I found some good pay-rock.

Q. Is that on the Lotta or Parish? A. Parish.

Q. Up on the bank or down the creek?

A. It is on an incline—it is all inclined there.

Q. (By Judge WINN.) Is that Parish #1 or #2? A. Number 2. [659]

Q. Mark that place. (Witness does so.)

Q. So that if Mr. Tripp says he has scoured that claim for values and was unable to get any, he has not looked in any place you mentioned?

A. He has not looked in the right places.

Judge WINN.—Mr. Tripp didn't say anything of the kind. We object to that.

Q. I wish if you know any other place on the claim where there is pay-rock in place you would indicate it. A. On the Parish #2?

Q. On the Parish #2.

A. Well, right close to where I marked there, there is two crosscut ditches that I made—*there* are close together there and there is pay on the same trend that that is marked, in both ditches. It shows there is a belt through there that carries pay.

Q. That is across the formation?

A. That is across the formation; the formation

(Testimony of William M. Ebner.)

trends northwest and southeast and these cross—my aim was to make these cuts cross the formation; it is about in this direction.

Q. Your principal work on what is known as the Ebner properties has been the Taku, Keystone and Crown Point? A. Yes, sir.

Q. And upon other claims up the hill?

A. Not any up the hill from the Crown Point; no.

Q. You were talking to me a little while ago about the Keystone and some other claims. Where are those claims?

A. The Keystone is right here; there has been some done on the Grand Review up here.

Q. You haven't done much work on the Lotta?

A. You mean the Lotta? [660]

A. You mean mining?

Q. Yes, mining? A. No; no mining.

Q. And you have never done any mining on the Parish #2?

A. No; the Lotta is below the present workings; it would be impracticable.

Q. It would require other working?

A. You would have to get a track and tram to hoist up to where I was operating.

Q. You haven't done any other development work but what was necessary to preserve the Parishes—than what you thought was necessary to preserve the Parish?

A. No, the assessment work is all, and ascertaining where the values were.

Q. Now, we have got through with the places

(Testimony of William M. Ebner.)

where you say value may be found?

A. On the Parish #2; yes, sir.

Q. And those values are all accessible at the present time?

A. Yes, I expect they are; I haven't been over there this spring.

Q. And the place you describe in your location notice in the Parish #2 is the place you describe as your discovery? A. Yes, sir.

Q. What year was it you discovered mineral in these other places—take, for instance, the place down underneath the present Alaska-Juneau flume, marked with two marks and near the tunnel.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

A. You mean right where the tunnel is?

Q. The place you call open cut, down near the creek from the tunnel? [661]

A. Oh, I think we started there along about 1901.

Q. When did you get through work there?

A. We worked there several years in that open cut.

Q. And when did you discover the mineral? And where?

A. We discovered the mineral on the edge as we started in—there was some showing of quartz on the edge at the break.

Q. Did you have it assayed? A. Yes, sir.

Q. Have you got any record of that assay?

(Testimony of William M. Ebner.)

A. I expect there is a record somewhere, but I wouldn't know where to look for it.

Q. Now, on the place marked over here near the house on the Lotta lode claim—when did you make that discovery?

A. I made that discovery along in 1902 or 3—somewheres along in there.

Q. There is another place you mentioned besides that and besides the discovery point.

A. Near the Borean pit?

Q. The one near the Borean pit is your discovery, is it not? A. That is the discovery.

Q. There is one a little ways down the creek from the tunnel there, I think you said below the open cut, another place down there? A. No.

Q. That ground up there near the shack that is on the Lotta lode claim, is that solid formation?

A. I got down to the solid formation, yes, sir.

Q. How deep did you have to go?

A. Some places four or five feet—six feet in some places.

Q. Any slide material there? [662]

A. It is all slide on the surface.

Q. About four or five feet deep?

A. In some places I did; yes.

Q. What time of the year was it you made this discovery we have just been talking about near the side line of the Lotta?

A. You mean all of them, both places?

Q. The point near the house?

A. I don't remember just what time of the year

(Testimony of William M. Ebner.)

it was; it was during the summer—we turned the water in and then took and cut the roots and cut the brush and took the rocks out and washed the dirt down and got the excavation that way and cut out a ditch—I don't remember just what time in the summer. As I testified before, I would take the men over there and I had men to spare.

Q. You don't know what time then?

A. During the summer.

Q. The summer of what year?

A. We worked there of even the summer of 1899. We started to do some of that work and 1900 and 1901.

Q. Was the discovery made in 1899 or 1900?

A. That discovery just below the cabin? That was not made until 1902 or 3.

Q. And the discovery in the open cut near the creek?

A. That was made, I think, in 1901, that discovery there.

Q. What time of the year was that?

A. I don't remember just the time—it was the summer season.

Q. And the open cut here?

A. You mean the Borean cut?

Q. Yes.

A. That is our discovery and that is where we started work in [663] the first instance—got the water in and got the dam in.

Q. How far is your discovery on the Parish #2 lode—your original discovery of 1899—how far is it

(Testimony of William M. Ebner.)

from there to the end line stakes 3 and 4 of the Parish #2 lode as indicated on this map?

A. You mean the discovery of Number 2?

Q. Yes.

A. It is only a short distance. The discovery stake was not set right on the discovery—just a little south of it.

Q. Your location notice was posted in a tin can on your discovery stake? A. Yes, sir.

Q. And it was just a few feet from the north end line of the Parish—I mean from the southeast end line of the Parish #2?

A. From the southeast end line of the Parish #2, yes, sir.

Q. If that is the case, why is it your location notice reads this way: Commencing at the notice of location posted on a post in Gold Creek canyon, about 600 feet in a westerly direction from the southwest corner of the Lotta claim. Now, as I understand it, the southwest corner of the Lotta claim is corner #2?

A. No; the southwest corner is this right here.

Q. That is the southwest?

A. That is the southwest and this is the northwest.

Q. Six hundred feet?

A. That description refers to—from there to the discovery and then across.

Q. The discovery is located about 300 feet from the southwest corner of the Lotta, is it not?

A. More than that. [664]

(Testimony of William M. Ebner.)

Q. The discovery is about this point on that map, marked "open cut," is it not?

A. Yes, just about.

Q. That is midway of the Parish claim and the Parish claim is only 600 feet wide?

A. That is right; it is 125 feet from there to there, from this corner to this corner.

Q. That wouldn't add 125 feet to the distance when you took the triangle? A. Not quite; no.

Q. And running in a southeasterly direction parallel to the said Lotta and the Royal lode claims and about 300 feet from the same to the end of the lode claim, Parish #1, being 700 linear feet and from the location post in a northwesterly direction, parallel with the southwest line of the said Lotta claim 800 linear feet.

A. What location notice are you reading now?

Q. The Parish #2.

Mr. SHACKLEFORD.—I will reserve the right to introduce the notice of location in connection with the cross-examination of the witness.

The WITNESS.—If you have reference to the discovery post on Number 1 that is about 600 feet—

Q. I am talking about the discovery post on #2.

A. I didn't say it was 600 feet from the Lotta post to discovery stake Number 2.

Q. Where is your discovery stake on Number 1?

A. In Snowslide Gulch.

Q. At the point you have marked discovery here and which you have indicated in your testimony as discovery, near the point marked open cut, within

(Testimony of William M. Ebner.)

the lines of the Parish #2 [665] lode claim and near the southeast end line—how deep is bedrock under the slide there?

A. You mean the bedrock in the pit or where the discovery was? A. Yes.

A. The bedrock came right up—it was visible.

Q. How deep is the slide under there?

A. No slide at all—that is, for a short space.

Q. There is a ledge sticks up through the solid rock?

A. There is a ledge stuck up through the slide.

Q. When was the last time you were up there?

A. Last fall.

Q. It was up there then? A. Yes, sir.

Q. And there was still quartz in the ledge?

A. Yes, sir; going up to that Borean pit there, on the left-hand side of the pit, there is a large projecting rock stands on it—when you got into the Borean pit, the left limit of the pit, on the left-hand side, there is the bedrock came up, rock in place there, stuck out of the ground.

Q. I will now hand you a photograph and ask you if you recognize that. A. Yes.

Q. How close?

A. Well, I can't say, because it does not show enough of this side here—I can't say how close that is; it is not far from it; that is rock in place right there, I think.

Q. On the left? A. Yes, sir.

Q. Of the picture as you are looking at it?

A. Yes, sir.

(Testimony of William M. Ebner.)

Q. Is that the Borean pit? [666]

A. It looks like the Borean pit around it there.

Q. You were up there last fall?

A. I walked across there last fall; yes.

Q. That is a photograph of a part of the Borean pit?

A. There was a light bit of snow on the ground when I went across so I couldn't see things just as plain as I might.

Q. That is a photograph of the Borean pit, part of it?

A. Part of it—that looks a good deal like it; yes, sir.

Q. Is that the boulder?

A. If that is what I think it is, that is rock in place. I have been down in the bottom of that and uncovered all this bedrock along in here; it is barely possible this is, but there is some rock that is not shown in the picture there, more rock in place.

Q. Do you know where that open cut is in the Borean pit?

A. Yes, it is quite a long open cut.

Q. Long enough almost to bury a man in?

A. I should say it was longer than that; it was from there down to the creek.

Q. I mean the open cut that traverses across the country there—it is probably the most recent one; it is the one that traverses across the hillside parallel to the creek.

A. That is not so very long a cut; no.

Q. That is a cut probably ten feet?

(Testimony of William M. Ebner.)

A. It is more than that.

Q. Twelve or fourteen?

A. That is where I said the men worked in 1908, and I just took a casual look at it last fall and couldn't say, but I think it would be twenty feet long.

Q. Where is your discovery with reference to that cut? [667]

A. It was right—that open cut was the discovery—that is, some of the rock.

Q. That is the open cut they were working on in 1908? A. Yes, sir.

Q. That is the one that is plain there now?

A. Yes, sir; that is where John Perelle was put to work.

Q. Right in that cut—that is your discovery?

A. Yes, sir.

Q. Where is that cut from this boulder?

A. I think that rock is one side of it—that shows one side of that rock right there.

Mr. SHACKLEFORD.—We offer the picture in connection with the witness' testimony.

Objected to as incompetent, irrelevant and immaterial.

The WITNESS.—It doesn't show enough on this side—I think it is, it looks like it—I wouldn't be sure.

Objection overruled. Plaintiff allowed an exception. It is marked Defendant's Exhibit #9 and admitted in evidence.

Q. I show you another picture and I will put a

(Testimony of William M. Ebner.)

mark on it in red ink and at a certain point where the snow is lying on the ground. I will ask you what that place is, where the snow is.

Judge WINN.—We object as not proper cross-examination and not proper for them to offer these photographs that we have had somebody take.

Objection overruled. Plaintiff allowed an exception.

A. I don't know what that is.

Q. You don't?

A. No; not that where you put the mark—that is a bunch of [668] snow here. Here is the rock I am talking about. You are looking down towards Juneau. Now, that is the rock on the left there.

Q. On the right, as I am looking at the picture?

A. On the right as you are looking at the picture, yes—that looks like the rock I had reference to.

Q. That is the rock you made the discovery at?

A. I think so; it don't show enough here, but it looks like it.

Q. You don't recognize that cut there where the snow is? A. No; I don't know where that is.

Q. You didn't see that cut there last fall?

A. I don't remember that cut.

Mr. SHACKLEFORD.—We offer that in connection with the witness' testimony.

Judge WINN.—We object to it; no foundation laid—no photographer has testified where it was taken or whether it shows any of the ground in controversy.

Objection overruled. Plaintiff allowed an excep-

(Testimony of William M. Ebner.)

tion. It is admitted as Defendant's Exhibit #10.

Q. Other than the books you have produced here the other day, you have no knowledge what was actually paid for the assessment work done on these claims? A. I have not, just now; no, sir.

Q. In counting up assessment work you always count the amount actually expended, don't you?

A. That is the way I have always done—actually expended; yes, sir.

Q. Irrespective of any rule about the value of assessment work?

A. Any assessment work I have done I have never followed any rule except the actual money expended.

By the COURT.—That is, what you paid for it? [669]

Redirect Examination.

(By Judge WINN.)

Q. I don't know what books Mr. Shackleford referred to. He said other than the books you produced the other day? A. I only produced one.

Q. I understand that account Mr. Shackleford offered in evidence the other day only covered the assessment work to 1906 on this property.

Mr. SHACKLEFORD.—I said outside of those books, he had no means of saying how much the work cost.

Q. You know what you actually paid out when you did the assessment work up there? A. Yes.

Q. And you testified concerning what you paid out before Mr. Shackleford identified the book?

A. Yes, I knew how much I paid out every year,

(Testimony of William M. Ebner.)

actual money—the cost.

Judge WINN.—Now, in this connection, if the record does not already show it, I ask that the stenographer be authorized to copy that page of the book that Mr. Shackelford offered in evidence the other day into the record, for the reason that we would like to release that book and there was only one page of it offered.

By the COURT.—Whatever the record shows at the time it was offered will be done. If there is no dispute about it the order will be made again.

Judge WINN.—My recollection is that Mr. Shackelford offered it in evidence when Mr. Ebner was recalled, but I don't know whether authority was given the stenographer to copy it or not. [670]
(By Mr. SHACKLEFORD.)

Q. You have had several talks with Mr. Webster concerning his testimony in this case?

A. Several? No, sir.

Q. Two, haven't you

A. I possibly had two—if I did they were both very short.

Q. You had one last night and one before he came on the stand the first time?

A. Last night? I had one before he came on the stand the first time—just asked him what he remembered about that.

Q. Did you take him over to see the photographs last night? A. No, sir.

Q. Have you taken him up to the point in dispute since you first commenced to talk with him?

(Testimony of William M. Ebner.)

A. No, sir.

(By Judge WINN.)

Q. I will ask you when you went up there to locate the Parish #2 did you have any conversation with a Mr. Nevins up there who was locating some claims up there for Mr. Corbus?

A. Not at the time I made my location. After—some time after—several weeks after I made my location I had some conversation with Nevins on the road.

Q. I don't remember whether I asked you this question or not: Did you have any conversation with Nevins at that time in regard to any locations he had been making there for Mr. Corbus and also in this conversation was anything said pertaining to your location of the Parish #2 claim? A. Yes.

Q. I wish you would relate what that conversation was.

Mr. SHACKLEFORD.—Counsel has already made the offer with reference [671] to that and we object to it as incompetent, irrelevant and immaterial, particularly as incompetent; no authority on the part of Mr. Nevins has been shown to surrender title or possession of any property he had located for the benefit of the company.

Objection sustained. Plaintiff allowed an exception.

Judge WINN.—I want to show that this conversation was had—that Mr. Nevins said virtually to Mr. Ebner in these words, substantially—that he would go up there and take up the stakes that he had

(Testimony of Angus Mackey.)

set on what he called the Oregon claim, and he also said to Mr. Ebner at the time he made his location, the Oregon, for Mr. Corbus, that he had seen some sign of a location there but didn't know that Mr. Ebner had located the ground ahead of him—that is substantially what I desire to prove by the witness.

Offer denied. Plaintiff allowed an exception to the ruling.

Witness excused. [672]

**[Testimony of Angus Mackey, for Plaintiff
(Recalled).]**

ANGUS MACKEY, recalled.

(By Judge WINN.)

Q. In driving this tunnel called the Ebner mine tunnel, I will ask you if you used any power other than that generated by the men who were driving it with their picks, etc.

Objected to as incompetent, irrelevant and immaterial. Objection overruled. Defendant allowed an exception.

A. Yes, we used compressed air.

Q. Where did you get the compressed air?

A. From the compressor-house up near the old Ebner mill—on this side of the old Ebner mill.

Q. It was that old compressor hoist that was used in connection with the running of the old Ebner mill?

Objected to as leading. Sustained.

Q. What compressor hoist was it and what machinery that you used for generating this power?

(Testimony of Angus Mackey.)

A. It was the compressor Ebner used at the upper works.

By the COURT.—On the Lotta?

A. I think it is on the Lotta.

Q. There is but one compressor hoist up there.

A. There is just one compressor up there—it is on this side of the old mill.

(By Mr. SHACKLEFORD.)

Q. That is the compressor hoist marked on this exhibit, Plaintiff's Exhibit "U," on the Lotta claim?

A. Yes, that is the one there.

Q. And I understand you that this tunnel was being driven not only for the purpose of developing the unpatented claims but also the patented claims?

A. Yes, sir, the whole group. [673]

Q. Now, do you know where the agreement is between Mr. Ebner and your company or any one else about the privilege of driving through the Cape Horn lode? A. No, I do not.

Q. Did you ever have any conversation with Mr. Ebner prior to this spring about driving through these Cape Horn claims? A. No, sir.

Q. You don't know anything about such an agreement? A. No.

Q. So far as your knowledge and action as regards the company's property and your dealings are concerned, up to a few days ago you supposed that you owned the Cape Horn lode—that is, the Ebner Company owned the Cape Horn lode?

Objected to. Objection overruled. Exception allowed.

(Testimony of Angus Mackey.)

A. I don't know anything about the titles to the property.

Q. (By Judge WINN.) I believe you stated that you were working partly under the instructions of Mr. Bent and Mr. Underwood?

A. Yes, Mr. Bent is the general manager.

(By Mr. HELLENTHAL.)

Q. Mr. Bent is the general manager of the California & Nevada Copper Company?

Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

Objection overruled. Plaintiff allowed an exception.

A. That is what I understand.

Mr. SHACKLEFORD.—I want you to produce here, if you can, the books showing the amounts which you actually paid to the men doing the assessment work in 1909—have you such a book?

Judge WINN.—Mr. Mackey didn't do a lick of assessment work in 1909. [674]

By the COURT.—He can explain that—if he has or has not.

The WITNESS.—In 1909?

Q. Yes. A. We haven't got anything.

Q. Do you know where the books of 1909 are?

A. I do not—I never saw them.

Q. Do you know who kept them?

A. I do not. I was not in the country. I was in Central America at that time.

Q. Have you made any enquiry about them?

(Testimony of William M. Ebner.)

A. No, sir.

Witness excused. [675]

[Testimony of Wm. M. Ebner, for Plaintiff (Recalled—Cross-examination).]

WM. M. EBNER, recalled for further cross-examination:

(By Mr. SHACKLEFORD.)

Q. Were you in Juneau last year?

A. Part of the time.

Q. What time were you here?

A. I was in Juneau in the spring and then again in December.

Q. Were you here when this action was brought to eject these parties from this property?

A. No, sir.

Q. Were you here about the 12th of December?

A. About the 12th? Yes, I was here about the 12th.

Q. Who was it you had an agreement in writing with about crossing the Cape Horn lode?

A. Mr. Tripp.

Q. What was the nature of that writing?

A. I don't remember just now.

Q. A letter or a contract?

A. I don't remember, a sort of—I suppose it might be a contract or agreement.

Q. Who drew it for you?

A. I don't remember that.

Q. You kept a copy of it? A. Yes, sir.

Q. You don't remember where it was drawn?

A. I don't remember who drew that for us.

